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*Reed E. Hundt designated Charman effective November 29, 1993.
**Ervin S. Duggan resigned January 31, 1994.

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-67

In the Matter of

Amendment of Section 73.202(b), RM-8114
Table of Allotments,
FM Broadcast Stations.
(Globe, Arizona)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 24, 1994; Released: March 7, 1994

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Report and Order* in this proceeding, 8 FCC Rcd 6649 (1993), substituting Channel 247C3 for Channel 247A at Globe, Arizona, and modifying the construction permit of Station KRXS, Channel 247A, Globe, to specify operation on Channel 247C3. Subsequently, on our own motion, we issued an *Order* staying the effective date of the *Report and Order* pending receipt of concurrence from the Mexican government, 8 FCC Rcd 7691 (1993). Since that time, concurrence of the Mexican government has been obtained. Accordingly, we are setting aside the stay.

2. Accordingly, IT IS ORDERED, That the aforementioned *Order* staying the effective date of the *Report and Order* in this proceeding IS HEREBY SET ASIDE.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-17

In the Matter of

Amendment of Section 73.202(b), RM-8437
Table of Allotments,
FM Broadcast Stations.
(Jefferson City, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 24, 1994; Released: March 7, 1994

Comment Date: April 28, 1994
Reply Comment Date: May 16, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Richard L. Billings ("petitioner"), requesting the allotment of Channel 281A to Jefferson City, Missouri, as that community's third FM broadcast service. Petitioner submitted information in support of the allotment at Jefferson City and stated his intention to file an application if a channel is allotted to the community.

2. We believe petitioner's proposal warrants consideration. Channel 281A can be allotted to Jefferson City, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 1.5 kilometers (.9 miles) southwest of the community.[1] The site restriction will prevent a short spacing to Station WKKX, Channel 281C2, Jerseyville, Illinois.

3. In view of the fact that the proposed allotment would provide an additional broadcast service to Jefferson City, Missouri, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Jefferson City, Missouri	261C2, 295C	261C2, 281A, 295C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 28, 1994**, and reply comments on or before **May 16, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Frederick A. Polner
Rothman Gordon Foreman
& Groudine, P.C.
Third Floor, Grant Building
Pittsburgh, Pennsylvania 15219

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 281A at Jefferson City are North Latitude 38-34-00 and West Longitude 92-11-00.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS, INC.,
LDDS COMMUNICATIONS, INC. d/b/a
LDDSMETROMEDIA COMMUNICATIONS,
SCHNEIDER COMMUNICATIONS, INC.,
TELEDIAL AMERICA, INC.
Complainants,

v.

AMERITECH TELEPHONE OPERATING COMPANIES,
Defendants.

File No. E-93-122

ORDER

Adopted: February 28, 1994; Released: March 7, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 24, 1993, Schneider Communications, Inc. (Schneider), along with several other complainants, filed the above-captioned complaint against the Ameritech telephone operating companies (Ameritech)[1] seeking damages resulting from Ameritech's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On February 17, 1994, however, Schneider filed a motion requesting that it be dismissed from the complaint. In support of its motion, Schneider states that it has settled with Ameritech.

2. We are satisfied that granting Schneider's motion for partial dismissal will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Schneider Communications, Inc. Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE to the extent that it relates to the claims and requests for relief of Schneider Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

[1] The Ameritech Telephone Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TEL-AMERICA OF SALT LAKE CITY, INC.,
Complainant,

v.

U S WEST COMMUNICATIONS, INC.,
Defendant.

File No. E-93-162

ORDER

Adopted: February 25, 1994; Released: March 7, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1993, Tel-America of Salt Lake City, Inc. (Tel-America) filed the above-captioned complaint against U S WEST Communications, Inc. (U S WEST) seeking damages resulting from U S WEST's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On February 22, 1994, however, Tel-America and U S WEST filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-61

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Adopt
Regulations for Automatic
Vehicle Monitoring Systems

ORDER

Adopted: February 24, 1994; Released: February 25, 1994

By the Chief, Private Radio Bureau:

1. In late January and early February 1994 the Commission received written ex parte presentations from PacTel Teletrac (PacTel), Southwestern Bell Mobile Systems, Inc. (SBMS) and Mobilevision concerning the licensing of Automatic Vehicle Monitoring (AVM) systems, currently under consideration in this docket.

2. On February 9, 1994, the Bureau issued a Public Notice soliciting additional comments and reply comments on these filings.[1] Comment was specifically solicited regarding whether Rand McNally Basic Trading Areas (BTAs)[2] should be used as Commission-defined service areas for the licensing of AVM systems, or whether, alternatively, Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs) should be used as licensing boundaries.[3] The Public Notice established a due date of February 25, 1994 for comments and March 7, 1994 for reply comments.

3. On February 18, 1994, Metricom, Inc. (Metricom) requested additional time to respond to the ex parte filings specified in the Public Notice and requested that we clarify that interested parties may comment on the "technical issues" raised by these ex parte filings. Metricom bases this request on alleged difficulty in obtaining all of the ex parte filings from the Commission and on "confusion" over the scope of the comments requested.

4. Because of the apparent confusion on this question, we believe a short extension of time is warranted. Parties responding to the Public Notice may comment on the "technical issues" as well as any other issues raised by these filings.

5. For good cause shown, and pursuant to Sections 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 303(r), IT IS ORDERED THAT the period of time for filing comments and reply comments on ex parte filings addressed in our Public Notice, DA 94-129, released on February 9, 1994, IS HEREBY EXTENDED. Comments must be filed on or before March 15, 1994. Reply comments must be filed on or before March 22, 1994.

6. To file formally in this proceeding, you must file an original and four copies of all comments and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Comments and reply comments must be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554.

7. Ex parte filings, as well as all comments and reply comments in this proceeding, are available for public inspection as part of the record in PR Docket No. 93-61 during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. All or part of the text of these filings may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, N.W., Room 246, Washington, DC 20554, telephone (202) 857-3800.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Deputy Chief, Private Radio Bureau

[1] Public Notice, DA 94-129, released February 9, 1994, 59 Fed. Reg. 7239 (February 15, 1994).

[2] See Rand-McNally Commercial Atlas and Marketing Guide 36-39 (123d ed. 1992).

[3] This additional period to file comments and reply comments on these specific issues did not in any way abrogate the right of any interested party to file ex parte comments on any aspect of this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of

GTE SPACENET CORPORATION — File Nos. 52-DSS-AL-93, 54-DSS-MP/ML-93
for Consent to Jointly License
its GSTAR I Satellite and

GE AMERICAN COMMUNICATIONS, INC.
for Authority to Make Minor
Modifications to and to Reassign
its Authorized GE-I Satellite

ORDER AND AUTHORIZATION

Adopted: February 28, 1994; Released: March 1, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. GTE Spacenet Corporation (GTE) has applied to license jointly its GSTAR I domestic communications satellite[1] with GE American Communications, Inc. (GE). In addition, GE has applied for authority to make minor modifications to its authorized GE I satellite as well as to operate that satellite at 103^0 W.L. instead of at its assigned location of 85^0 W.L. Hughes Communications Galaxy, Inc. (Hughes) has filed a Petition to Deny both applications. Microspace Communications Corporation (Microspace) initially filed but subsequently withdrew a Petition to Deny GE's application for modifications and reassignment of GE-I.[2] Several other parties have filed comments.[3] GE subsequently filed a Request for Expedited Action and a Related Meeting with respect to its request for orbital reassignment of GE-I.[4]

2. In the joint license application, the applicants state that such a license would be similar to the joint license for the Aurora II satellite held by GE and Alascom, Inc.[5] GE and GTE would each maintain responsibility for complying with all Commission rules including adjacent satellite and international coordination activities. GTE would continue to provide telemetry, tracking and control for GSTAR I. The applicants assert that the proposed joint license will serve the public interest by allowing two established satellite operators to share joint responsibility for a satellite on which each company has customers and will provide an economical way in which to tailor capacity to demand.

3. In its modification application, GE proposes a power increase for the C-band transponders and a simplification of the Ku-band transponder plan for its hybrid GE-I satellite which it states will more closely align the satellite with marketplace demand and will allow users greater convenience and flexibility in their operations. Such changes will not, according to GE, result in undue interference to existing or future adjacent satellites. GE also seeks reassignment of GE-I from 85^0 W.L. to 103^0 W.L. GE asserts that this reassignment will allow GE to offer service continuity to GSTAR I customers,[6] as well as to provide service to its current Ku-band and C-band customers on other satellites. GE also states that allowing it to operate GE-I at 103^0 W.L. will increase competition by giving it a 50 state coverage hybrid location similar to those authorized to its competitors.

II. JOINT LICENSE APPLICATION

4. Hughes opposes the joint license application, arguing that it is "an impermissible attempt to assign a 'bare' license and transfer an orbital location." Hughes asserts that the proposed joint license is in reality an assignment of a license without the underlying tangible asset because there is no evidence to show that GE will have any proprietary interest in, or operational control over, the satellite and is an attempt to transfer a replacement expectancy to use 103^0 W.L. for GE-I. Such action is a violation of Commission satellite policies, according to Hughes.

5. GE and GTE filed motions to dismiss Hughes's Petition to Deny. Both assert that Hughes has no standing to oppose their joint license. They state that the Communications Act[7] requires an entity to be a party in interest to have the requisite standing to file a Petition to Deny an application and that Hughes fails to meet this requirement because it has not shown that it will be harmed if the joint license is approved. Further, GE and GTE argue that Hughes has raised no objections to GE's legal, technical or financial qualifications to operate a space station and its petition ignores the Commission's recent grant of a joint license to GE and Alascom to operate the Aurora II satellite.[8] The applicants state that the joint license proposal for GSTAR I and the modification request for GE-I are two separate applications and should be considered independently.

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[1] GTE filed an Application for Consent to Assignment of a License, FCC Form 702. GSTAR I's license is due to expire in 1995. See n. 13, *infra*.

[2] *See* Petition of Microspace Communications, Inc. for Voluntary Dismissal of its Petition to Deny Application of GE American Communications, Inc. for Minor Modifications and Reassignment, filed January 25, 1994.

[3] The following parties filed comments in support of GE's application for reassignment: Rainbow Programming Holdings, Inc., the National Aeronautics and Space Administration, Dana Commercial Credit Corporation, Hero Productions, United Video Corporation, National Cable Satellite Corporation on behalf of C-Span, National Broadcasting Company, Inc., New England Sports Network, the International Channel, the Family Channel, Viacom International, Inc., Alascom, Inc. and Cimmred Capital Company.

[4] *See* Letter to Chief, Satellite Radio Branch from counsel for GE, February 1, 1994.

[5] *See*, Application for Joint License of Aurora II Satellite (Aurora II), 7 FCC Rcd 2308 (Common Carrier Bureau, 1992).

[6] Because it already owns transponders on GSTAR I, GE states it can offer continuity of service to customers with GE-I whether or not it is authorized as a joint licensee of GSTAR I.

[7] 47 USC §309(d)(1).

[8] Aurora II, *supra* n.5.

6. Hughes, in reply, continues to argue that the joint license application is integrally related to GE's application to reassign GE-I to 103° W.L. and that Hughes's position as a satellite operator gives it standing to ensure that applicable Commission rules and policies are followed. It states that GE and GTE have provided no contract, affidavit or any other description of the terms of their proposed arrangement for GSTAR I. GTE responds that the joint license will provide business benefits to GTE[9] and to the public and GE states that Hughes's primary motivation in filing its Petition to Deny was to delay action on the pending requests for anticompetitive reasons.

7. We find that grant of the application for a joint license would be in the public interest. The relevant questions here are whether GE is qualified to be a space station licensee and whether such an arrangement promotes the public interest.[10] With respect to the first question, the Commission has found GE qualified to be a space station operator[11] and the Common Carrier Bureau has previously ruled that GE's qualifications are a matter of public record.[12] Hughes has presented no evidence challenging this conclusion.

8. The second aspect of our inquiry is whether a joint license arrangement would be in the public interest. Again, based on applicable precedent, we conclude that grant of a joint license for GSTAR I would be in the public interest. We do not agree with Hughes that the proposed arrangement amounts to the transfer of a bare license. The spacecraft involved is operating and serving customers, which, we presume, it will continue to do.[13] This is in contrast to the situation in the AT&T/Ford case,[14] cited by Hughes, where no facilities had been constructed, let alone launched and operating. That the applicants have not submitted documentation of their underlying business transaction is not dispositive because such submissions are not required. Business considerations or possible benefits to particular applicants are not necessarily part of our public interest evaluation of a joint license proposal. Instead, the fact that both licensees are qualified and represent that they can better serve their customers if they are jointly responsible for the satellite are appropriate considerations and consistent with the policies that guide the Commission's fixed-satellite licensing practices.[15] We will, however, hold both parties individually responsible for GSTAR I's operation and for complying with all Commission rules.[16]

III. GE-I MODIFICATION REQUEST

A. RELOCATION TO 103° W.L.

9. In addition to the joint license application, GE has filed a modification request for its GE-I satellite. This satellite was originally authorized in 1988[17] and was assigned to the orbital location of 79° W.L.[18] In 1993 the satellite was reassigned to 85° W.L. and its launch date was extended to March 1996.[19] GE's modification request consists of two components: reassignment of the satellite from 85° W.L. to 103° W.L. and certain technical modifications relating to transponder power and configuration.

10. GE asserts that its reassignment proposal is consistent with the Commission's orbital assignment policies as it will be an efficient use of the 103° W.L. location and will afford GE a hybrid satellite[20] location capable of serving all 50 states. GE states that it is the only satellite operator that does not have a 50 state hybrid location. Authorization to use 103° W.L. will put it on a par with other companies and will thus promote competition in the industry. Because GE is already serving customers from transponders it owns on GSTAR I and it will continue to provide service on that satellite whether or not its joint license is granted, GE states that authority to reassign GE I would also comport with the Commission's replacement expectancy policies by offering continuity of service to customers from the same location.

11. Hughes filed a Petition to Deny the modification request, stating that because of the scarcity of 50 state hybrid locations,[21] the Commission should institute an applications processing round before assigning the 103° W.L. location. Hughes asserts that GE should not be permitted to obtain replacement expectancy rights to 103° by becoming a joint licensee of GSTAR I. GTE filed comments in support of GE's modification request, stating that its use of 103° would be the most efficient use of that hybrid location and that a request to continue follow-on operation with GE-I after GSTAR I is retired clearly qualifies as a replacement expectancy. Several customers or potential customers of GE as well as users of transponders on GSTAR I filed comments in support of its request.[22] In its Request for Expedited Treatment, GE states that delay in acting on its reassignment proposal will result in the unnecessary expen-

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[9] GTE states that the joint licensing arrangement will provide it with certain rights to capacity on GE satellites as well as additional capital.

[10] In view of our decision to grant the joint license application, we do not reach the issue of whether Hughes had standing to file a Petition to Deny. For a discussion of the issue of standing, see Lawrence N. Brandt, 3 FCC Rcd 4082 (Dom. Fac. 1988).

[11] *See eg.*, GE American Communications, Inc., 3 FCC Rcd 6989 (1989).

[12] Aurora II, *supra* n.5.

[13] The license for GSTAR I will not expire until 1995. GTE was authorized to replace GSTAR I at 103° but relinquished this authorization in 1990. GTE Comments in Opposition at 11-12.

[14] American Telephone and Telegraph Co. (AT&T/Ford) 2 FCC Rcd 4431 (1987).

[15] *See* Aurora II, *supra* n.5, where we stated that grant of a joint license to Alascom and GE was in the public interest because both entities are experienced and financially well qualified and had previously been successful joint licensees of Satcom V. *See also*, Domestic Fixed-Satellite Service, 88 FCC 2d 318 (1981), where the Commission discussed its "open skies" policies for domestic satellites.

[16] *Id.*.

[17] GE American Communications, Inc., 3 FCC Rcd 6984 (1988).

[18] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service (1988 Assignment Order), 3 FCC Rcd 6972 (1988).

[19] GE American Communications, Inc., 7 FCC Rcd 5169 (1993).

[20] Hybrid satellites operate in both the C and Ku bands and thus need corresponding orbital location assignments.

[21] Hughes states that, assuming 103° W.L. is assigned to GE-I, only 93° W.L. and 127° W.L. remain unassigned hybrid locations capable of serving all 50 states.

[22] These comments stress the desirability of 50 state coverage and urge the Bureau to give GE the opportunity to provide such coverage from a hybrid satellite.

diture of over $2.5 million dollars in antenna costs. In addition, GE asserts that expedited action is necessary to provide certainty to prospective customers.

12. We find that grant of GE's request for reassignment is in the public interest. GE has met its burden to demonstrate that its reassignment request is consistent with the basic structure of the domestic satellite assignment plan and with Commission satellite policies, and that its proposal to provide service from 103^0 W.L. will benefit customers who need 50 state coverage service. Although GE-I will be able to provide follow-on service to its own and possibly to GTE's customers on GSTAR I, we do not reach the issue of whether, by holding a joint license for the latter satellite, GE gains a replacement expectancy for the use of 103^0 W.L. Our decision to allow reassignment of GE-I is limited to the facts of this case based on established policies governing assignments of orbital locations.

13. Commission policies regulating domestic satellites have traditionally encouraged flexibility and competition in the industry.[23] In its 1988 Assignment Order[24] the Commission stated that it would not allow requests for particular orbital locations to limit its flexibility to assign locations that meet the public interest. Instead, the Commission would balance requests with several factors including the equitable treatment of new and existing satellite operators. The Commission also recognized the importance of distributing 50 state coverage locations in an equitable manner.[25] The Commission stated that it would entertain requests for changes in orbital assignments if they were consistent with the basic structure of the plan and are agreed to by most if not all of the operators affected by the change. If any operator does not agree, the burden is on the applicant to demonstrate why its proposed change is preferable. Finally, the Commission stated that all satellite operators were free to apply for reassignment to any unassigned orbital location. In its Reconsideration Order,[26] the Commission granted several reassignment requests, recognizing the importance of 50 state coverage locations as a public interest consideration.

14. Commission policy supports the grant of GE's reassignment request. Further, no new processing group is necessary because the request involves a previously authorized satellite and does not require the assignment of an additional orbital location.[27] The 103^0 W.L. orbital location is not permanently assigned to a satellite in either band.[28] There are at least two remaining locations that could be assigned to hybrid satellites providing 50 state coverage[29] and no new applications have been filed to construct or launch fixed satellites in the 4/6 or 12/14 GHz bands. Even if 103^0 W.L. is assigned to GE-I, potential new applicants proposing hybrid satellites and requesting 50 state coverage could be accommodated at other locations. In the past few years, hybrid satellite technology has become highly developed and operators are taking advantage of the economic and technical superiority of satellites that can operate in both the C and Ku bands.[30] The Commission has recognized the advantages of providing the ability to satellite operators to operate hybrid satellites and designated 103^0 as a hybrid assignment in the 1988 Assignment Order by assigning Spacenet I-R to that location.[31] GE presently is not authorized to use a hybrid location capable of serving all 50 states and it claims that it is disadvantaged because its competitors have such ability. For these reasons we conclude that grant of GE's request is in the public interest.

B. OTHER TECHNICAL MODIFICATIONS

15. GE also proposed some additional technical modifications of its GE-I satellite. These include a moderate power increase for the C-Band transponders and an alteration of the Ku-Band transponder plan. Hughes opposed the request to modify the Ku-Band transponder plan and raised two other objections to GE's proposal. We grant GE's request to modify GE-I.

16. With respect to the proposed C-Band power increase, we find that this modification will not cause harmful interference. GE-I is authorized to operate with 24, 36 MHz 10 watt transponders. In its modification application, GE proposes to increase the power levels to a variable 12-18 watts depending on the area served to provide higher service link power margin which would improve service performance to its customers. The increase in power will also allow use of smaller antennas and will reduce the cost of service. GTE commented that its Spacenet-IV satellite at 101^0 can be successfully coordinated with GE-I at 103^0 W.L. because GE will remain flexible in its arrangement of high power video and single channel per carrier (SCPC) traffic on GE-I.

17. Given the maximum EIRP of the GE-I C-Band transponders, it is unlikely that the increase in power will create the potential for harmful interference to existing satellites. The GE-I C-Band technical design is not appreciably different from the Spacenet-IR satellite previously authorized by the Commission to operate at 103^0 W.L.[32] Pursuant to Commission rules,[33] GE has included in the technical appendix to its request an analysis for coordination between GE-I and Spacenet-IV at 101^0. Specifically, GE has described how it will arrange its analog video transmissions to avoid harmful interference to Spacenet-IV SCPC traffic. It appears that coordination of GE-I with existing satellite networks can be achieved and GE-I will not cause harmful interference.

18. GE also proposes an alteration of the GE-I Ku-Band transponder plan. GE-I is authorized to operate with 16, 54 MHz transponders at 60 watts and GE proposes to modify

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[23] *See, eg.*, Domestic Fixed-Satellite Service, *supra* n.15.

[24] 1988 Assignment Order, *supra* n.18.

[25] *See also* STLC, 3 FCC Rcd 6737 (1988), where the Commission denied a request for reassignment where the applicant was already assigned two orbital locations capable of providing 50 state coverage.

[26] Reconsideration of 1988 Orbital Assignment Order, 5 FCC Rcd 179 (1990).

[27] 85^0 W.L. will be available for reassignment.

[28] GSTAR I is temporarily operating in the Ku-Band and Galaxy VI is temporarily in the C-Band portion of this location.

[29] These locations are 93^0 W.L. and 127^0 W.L. GE-I's assigned location at 85^0 W.L. is capable of providing only marginal 50 state coverage necessitating elevation angles lower than 5 degrees, particularly in Alaska, and therefore increasing the potential for harmful interference. 93^0, 103^0 and 127^0 offer substantially greater coverage to some states including Alaska.

[30] *See eg.* Hughes Communications Galaxy, 6 FCC Rcd 72 (1991).

[31] *See*, 1988 Assignment Order, *supra* n.18.

[32] Spacenet-IR was proposed to operate with 24, 36 MHz transponders of 16 watts.

[33] 47 CFR 25.140 (b)(3).

this to 24, 36 MHz transponders of 60 watts. In order to match the polarization offset of GSTAR-IV's Ku-Band transponders at 105° W.L., GE proposes to cant[34] the transponders by 26°. Hughes objects, stating that any new satellite operator who wishes to provide service from 101° and 105° after Spacenet-IV and GSTAR-IV are retired but who does not wish to use GE's non-standard polarization will be unduly burdened when coordinating with GE-I. Hughes acknowledges that Ku-Band frequency plans are not "standardized" but states that all satellite operators know that reassignments may be required in the course of a satellite's lifetime. Ku-Band polarization angles are effectively standard at 90° horizontal/vertical offset and Hughes suggests that GE be required to install a switch on GE-I to restore polarization to "normal." GE states that GTE is the only operator actually affected by the 26° cant because Spacenet-IV will have a different polarization orientation than GE-I. GTE has accepted this polarization orientation in the successful coordination of GE-I and there is no reason to assume that other operators cannot do the same. GE states that polarization cants are not unusual since satellites with offset polarizations are less difficult to coordinate with adjacent satellites than are those with co-polarization.

19. Given the maximum EIRP of the GE-I transponders and the proposed alteration of the Ku-Band transponder system, it is not likely that this proposed alteration will create the potential for harmful interference to existing satellite networks. GE has provided an interference analysis for coordination with the satellites 2° away from GE-I which includes GE's proposal to cant GE-I's Ku-Band transponders. Commission rules do not require standard polarization at Ku-Band and require a polarization switch only for C-Band. GE has coordinated with adjacent satellites and it does not appear that Hughes or any other operator will suffer harmful interference from GE-I if it is located at 103°. Because GE has successfully coordinated at 103°, it is also not likely that satellite operators will be unduly burdened by GE-I's transponder cant in any future coordination efforts. Therefore, we will not require a Ku-Band polarization switch on GE-I.

20. In addition to its objections to GE's Ku-Band transponder plan proposal, Hughes raises two additional issues regarding GE's modification request. First, Hughes states that GE-I is a less sensitive satellite than Hughes's Galaxy-IV(H) which is located at 99° W.L. and that GE-I will require higher uplink power than Galaxy-IV(H) to saturate its transponders. This need for higher uplink power could create the potential for harmful interference to Hughes's satellite. GE replies that GTE's Spacenet-IV located at 101° W.L. is a more sensitive satellite than Galaxy-IV(H) because Hughes is formatting video over almost all of its transponders and Spacenet-IV is a mixed use satellite with more sensitive SCPC traffic. GE states that if GTE is able to coordinate its closer, more sensitive satellite, Hughes should be able to do the same with a less sensitive satellite located farther away. GE also indicated that the power used to saturate the transponders on GE-I will be comparable to that used by Hughes for Galaxy-IV(H). Based on the facts in this record, we agree with GE that there should be no significant coordination problems between GE-I and Galaxy-IV(H) and that GE-I's operation at 103° should not cause harmful interference to Galaxy-IV(H) at 99°.

21. Finally, Hughes claims that GE's modification request is not supported by sufficient analysis. Hughes states that GE's interference analysis does not describe the types of typical carriers on GE-I and the sizes of its typical earth stations. Hughes further states that GE should provide a detailed description of proposed modifications showing which aspects of the initial application are superseded by the new technical specifications. GE replies that the transponder plans, power levels, TT&C and emissions are provided in the technical appendix to its modification request. The earth station sizes will be 6.1, 8.1 and 11.0 meters and will be operated in a non-saturating mode which will cause no more interference than the 6.1 meter antenna. We find that GE's modification request is sufficiently detailed to conform with Commission rules.[35] With the exception of the specific modifications requested, the technical criteria for GE-I remain the same as those approved when the satellite was originally authorized in 1988 and GE is not required to refile information that has not changed.

IV. CONCLUSION

22. Accordingly, IT IS ORDERED, pursuant to Section 301 of the Communications Act, 47 USC 301, and the Commission's rules on delegated authority, 47 CFR 0.291, that the application to jointly license the GSTAR I satellite to GE American Communications, Inc. and GTE Spacenet Corporation, File No. 52-DSS-AL-93, is granted. Both joint licensees will be individually responsible and liable for the operation of the satellite.

23. IT IS FURTHER ORDERED that GE American Communications, Inc.'s application to modify the authorization for its GE-I satellite, 3 FCC Rcd 6984 (1988), File No. 54-DSS-MP/ML-93, is granted.

24. IT IS FURTHER ORDERED that, pursuant to 47 CFR 25.111(b), GE American Communications, Inc. shall provide the Commission with all required information on the GE-I satellite at 103° W.L. for international coordination purposes.

25. IT IS FURTHER ORDERED that the Petition of Microspace Communications, Inc. for Voluntary Dismissal is granted and the Petition to Deny filed by Hughes Communications Galaxy, Inc. is denied.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[34] The term "cant" refers to an offset in polarization between two or more carriers to avoid co-polarization and lessen the potential for interference.

[35] 25 CFR 117(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-175

In the Matter of

Amendment of Section 73.202(b) RM-8264
Table of Allotments,
FM Broadcast Stations.
(Pateros, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1994; Released: March 8, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Pateros Community Broadcasters ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 4360 (1993), proposing the allotment of Channel 300A at Pateros, Washington, as its first local aural transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Comments were jointly filed by Community Log Church, Chelan Christian Broadcasting, Columbia Basin Christian Translator Association, Tri City Christian Translator Association, Christians in Action and North Okanogan Christian Translator. Petitioner filed reply comments. Petitioner subsequently filed a request for withdrawal of its petition.[1] We will grant petitioner's request.

2. Accordingly, IT IS ORDERED, That the petition for rule making filed by Pateros Community Broadcasters to allot Channel 300A at Pateros, Washington, IS DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In accordance with Section 1.420(j) of the Commission's Rules, petitioner submitted a statement that it has not received or been promised any consideration for the withdrawal of the petition for rule making.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-112

In the Matter of

Amendment of Section 73.202(b), RM-8210
Table of Allotments,
FM Broadcast Stations.
(Buckeye, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1994; Released: March 8, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 2807 (1993), issued in response to a petition filed on behalf of Mobley Broadcasting, Inc. ("petitioner"), licensee of Station KMJK(FM), Channel 295A, Buckeye, Arizona, proposing the substitution of Channel 295C2 for Channel 295A and modification of its license accordingly. Petitioner filed comments reiterating its intention to apply for Channel 295C2, if allotted to Buckeye, Arizona, as requested. No other comments were received.

2. We believe the public interest would be served by substituting Channel 295C2 for Channel 295A at Buckeye, since it could provide an expanded coverage area FM service to the community.

Technical Statement

3. As indicated in the *Notice*, Channel 295C2 can be allotted to Buckeye consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules, at the petitioner's specified site, located 27.2 kilometers (16.9 miles) west of the community at coordinates 33-21-03 and 112-52-41. Additionally, as Buckeye, is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government in this proposal was obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 22, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Buckeye, Arizona, as follows:

City	Channel No.
Buckeye, Arizona	295C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Mobley Broadcasting, Inc. for Station KMJK(FM), IS MODIFIED to specify operation on Channel 295C2 in lieu of Channel 295A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Mobley Broadcasting, Inc., licensee of Station KMJK(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Buckeye, Arizona.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-9

In the Matter of

Amendment of Section 73.202(b), RM-8152
Table of Allotments,
FM Broadcast Stations.
(Silver City, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 28, 1994; Released: March 8, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Avila Beach, Ltd. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 765 (1993), proposing the substitution of Channel 225C2 for Channel 233A at Silver City, New Mexico, and the modification of Station KSCQ's license to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 225C2 for Channel 233A at Silver City since it could provide the community with a wide coverage area FM service and enable Station KSCQ to expand its service area. As proposed, we will also modify Station KSCQ's license to specify operation on Channel 225C2 in lieu of its present Channel 233A. Recognizing that the petitioner had requested an upgrade to a non-adjacent channel, the *Notice* proposed the allotment of Channel 281C2 to accommodate any additional expressions of interest in a Class C2 channel at Silver City. However, since no party has expressed such an interest, we will not allot Channel 281C2.

Technical Summary

3. Channel 225C2 can be allotted to Silver City in compliance with the Commission's minimum distance separation requirements at Station KSCQ's licensed transmitter site.[1] Mexican concurrence in the allotment of Channel 225C2 has been received since Silver City is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 22, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Silver City, New Mexico	225C2

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Avila Beach, Ltd., for Station KSCQ, IS MODIFIED to specify operation on Channel 225C2, in lieu of Channel 233A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Avila Beach, Ltd., licensee of Station KSCQ, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 225C2 at Silver City are North Latitude 32-50-40 and West Longitude 108-14-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. ITC-94-076

Application for authority to make available facilities in the TAT-9 Cable System.

ORDER AND AUTHORIZATION

Adopted: Februrary 17, 1994; Released: March 8, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that grant of the application is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. ITC-94-076 IS GRANTED, and American Telephone and Telegraph Company (AT&T) is authorized to:

a. make available to Gibtel, AT&T's correspondent in Gilbraltar, on an Indefeasible Right of User (IRU) basis, AT&T's half-interests in 30 Minimum Assignable Units of Ownership (MAUOs)[1] in the TAT-9 cable;

b. make available to Nepal Telecommunications, AT&T's correspondent in Nepal, on an IRU basis, AT&T's half-interests in 30 MAUOs in the TAT-9 cable;

c. make available jointly to IDC of Japan and Telefonica of Spain, on an IRU basis, whole interests in 2 MAUOs in the TAT-9 cable: and

d. make available jointly to Telmex of Mexico and Italcable of Italy on an IRU basis whole interests in 30 MAUOs in the TAT-9 cable.

3. Nothing in this order shall be construed as superseding any of the conditions set forth in any previous Commission Order dealing with the TAT-9 Cable System.

4. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of this Order's public notice date (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] A MAUO is a minimum assignable unit of ownership, which is a 64 kilobit per second circuit equivalent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ARC PROFESSIONAL SERVICES GROUP, INC. File No. CSS-87-017-(LA)

Application for Authority to Construct, Launch, and Operate Space Stations in the International Fixed Satellite Service

ORDER

Adopted: February 22, 1994; Released: March 8, 1994

By the Acting Chief, Common Carrier Bureau:

1. ARC Professional Services Group, Inc. (ARC) has filed a petition requesting reconsideration of an order by the Chief, International Facilities Division (Division) that dismissed the above-captioned application.[1] No comments were received in response to ARC's petition. For the reasons set forth below, we deny ARC's petition.

BACKGROUND

2. By Order released June 13, 1991, the Division dismissed the above-captioned application for authority to construct, launch and operate C-band satellites stationed at 41^0 W.L. and 171^0 W.L. for the provision of trans-Atlantic and trans-Pacific service, respectively.[2] The application involves satellites that are part of the Tracking and Data Relay Satellite System (TDRSS) operated by NASA. The TDRSS satellites relay communications between ground stations in the U.S. and low-orbiting spacecraft, including manned spacecraft, when the spacecraft are over the horizon and not capable of direct communication with U.S. ground stations. TDRSS satellites were developed because the existing worldwide network of ground stations can provide only limited coverage of low orbit spacecraft as they circle the earth and cannot adequately handle the increasingly high rates at which new generations of spacecraft transmit information. Although the TDRSS satellites use Government frequencies in the S-band (2025-2300 MHz) and Ku-band (13.750-15,115 MHz) to provide the tracking and data relay communications service, each of the aforementioned satellites is equipped with twelve transponders which can operate on commercial C-band (4/6 GHz) frequencies. It is the C-band transponders on the TDRSS satellites located at 41^0 and 171^0 W.L. that are the subject of this application.

3. SGC, ARC's predecessor, had sought to use the C-band transponders for non-commercial purposes, but the application was not acted on. NASA thereafter sought competitive bids for the commercial use of the C-band capacity on the TDRSS satellites located in the Atlantic and Pacific Ocean regions. INTELSAT was initially the successful bidder with respect to the C-band capacity on the TDRSS satellites located at 41^0 and 171^0 W.L. Prior to NASA's award of the TDRSS capacity to INTELSAT, Comsat had filed an application with the Commission to participate in INTELSAT's proposed acquisition of TDRSS C-band capacity as well as other capacity in order to deal with shortages in three ocean regions.[3] On January 30, 1990, however, Columbia, another bidder, was granted injunctive relief against NASA which barred NASA from proceeding to sell exclusive control of the capacity to INTELSAT until NASA referred to the Small Business Administration the question of whether Columbia is a "responsible" customer to purchase capacity pursuant to the Small Business Act, 15 U.S.C.A. §637(b)(7)(A) (West Supp. 1989).[4] Columbia petitioned the Commission to withhold action on Comsat's request to participate in the INTELSAT procurement of TDRSS capacity pending resolution of the administrative remedies ordered by the court. Comsat requested the Commission to hold in abeyance that portion of its application dealing with the TDRSS capacity.[5] In a letter dated May 17, 1990 the Small Business Administration certified that Columbia is "responsible" to perform the lease agreement covering the TDRSS capacity and required NASA to award the contract to Columbia.[6] On June 8, 1990 NASA awarded the contract for C-band capacity on the TDRSS satellites located at 41^0 and 171^0 W.L. to Columbia.

4. Based on NASA's award to Columbia of C-band capacity on the TDRSS satellites located at 41^0 and 171^0 W.L.,[7] the Commission dismissed that portion of Comsat's application regarding acquisition of TDRSS capacity.[8] The Division's June 13, 1991 order, which is the subject of this petition, dismissed ARC's application for the same reasons. Subsequent to NASA's award of the capacity to Columbia, it was determined that Columbia would have to operate at 174^0 W.L. instead of 171^0 W.L. because of technical defi-

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[1] ARC Professional Services Group, Inc., 6 FCC Rcd 3544 (1991).

[2] The application was originally filed on March 31, 1987 by Systematics General Corporation (SGC). By letter dated October 15, 1987 SGC requested to substitute ORI, Inc. as the applicant. The request for substitution resulted from an October 3, 1987 pro forma corporate reorganization of Atlantic Research Corporation, the corporate parent of SGC. ORI, Inc. was subsequently restructured into ARC Professional Services Group, Inc. which was then substituted as the applicant for the instant application.

[3] *See* Comsat's Application File No. CSS-89-004.

[4] *Columbia Communications Corporation v. Truly et al.*, Civil Action No. 89-2763 (D.D.C. January 30, 1990).

[5] Letter to the Commission from Keith H. Fagan (Attorney for Comsat), dated March 2, 1990.

[6] Letter dated May 17, 1990 from Robert J. Moffitt, Associate Administrator for Procurement Assistance, U.S. Small Business Administration to Charles T. Force, Associate Administrator for Space Operations, National Aeronautics and Space Administration.

[7] Subsequent to being awarded the TDRSS contract, Columbia, in conjunction with NASA requirements, indicated that it would operate a different satellite located at 174^0 W.L. because of technical deficiencies in the TDRSS located at 171^0 W.L. Columbia's license request reflects its operation at the 174^0 W.L. orbital location.

[8] Communications Satellite Corporation, 5 FCC Rcd 5952 (1990).

ciencies in the satellite located at 171^0 W.L. The grant of authority for Columbia to use the 174^0 W.L. location was in lieu of its use of the 171^0 W.L. location. Thus, any use of the 171^0 W.L. location would require a new application. ARC believed, however, that NASA would also operate a new TDRSS satellite at 171^0 W.L., which it intended to use. ARC therefore sought to rely on the original 1987 application for the 171^0 W.L. orbital location in the event NASA did put a new satellite at 171^0 W.L. orbital location.

5. ARC requests reconsideration of the Division's June 13, 1991 order and reinstatement of the subject application, as amended,[9] based on the assertion that NASA always intended for ARC to operate the C-band capacity on a TDRSS satellite located at 171^0 W.L. ARC also states that the Commission was made aware of this fact by a letter dated September 27, 1990 which advised the Commission that:

> "[ARC intends] to amend the above-referenced application [the application to operate TDRSS-3 at 171^0 W.L.] by substituting the TDRSS-1 satellite for the TDRSS-3 satellite specified herein... Since grant of Columbia's application would necessitate dismissal of ARC's application in its present form, ARC requests that the Commission hold ARC's application in abeyance until the amendment is filed."

Although the letter expressed ARC's intent to file an amendment within a few weeks, ARC states that it was not possible to file the amendment because NASA did not decide what satellite would replace TDRSS-3 at 171^0 W.L. Until NASA made that decision, ARC states that it did not have NASA's agreement to file the necessary amendment.

6. ARC also states that the public interest will be served by a grant of the petition for reconsideration and reinstatement of its application since denial will result in ARC's having to file a new application for TDRSS-6 at 171^0 W.L. Instead of paying a $1,000 filing fee for an amendment to a pending application, ARC notes that it will have to pay a $70,000 filing fee for a new application. Under the terms of its agreement with NASA, ARC states that NASA will have to reimburse it for the filing fee. Thus, ARC views the effect of denying the petition as: (1) transferring $70,000 from NASA to the Commission; (2) requiring a new public notice, with further comments and petitions possible; and (3) creating additional delay and expense for all parties. ARC views the substitution of TDRSS-6 for TDRSS-3 as a minor amendment since the two satellites are "identical in all respects" and the amendment raises no new orbital position, frequency allocation or coverage issues.

DISCUSSION

7. After review of the arguments set forth by ARC in its petition, we conclude that ARC has not provided any reason why the Division's order dismissing its application should be reversed and its application reinstated. Section 1.106 (d)(2) of the Commission's Rules, 47 C.F.R. § 1.106 (d)(2), states that a petition for reconsideration shall, where appropriate cite the findings of fact and/or conclusions of law petitioner believes to be erroneous. ARC has not shown that any aspect of the Division's order was in error. The Division dismissed its application because the capacity that would have been used by ARC had been awarded to Columbia. NASA's award to Columbia to operate a TDRSS satellite at 174^0 W.L. was in lieu of its operation of the TDRSS satellite at 171^0 W.L. since the satellite at 171^0 W.L. experienced technical deficiencies. In light of these technical deficiencies, the technical information filed with ARC's application to operate a TDRSS satellite at 171^0 W.L. was transferred to the 174^0 W.L. orbital location. Thus, any operation by ARC of a TDRSS satellite at the 171^0 W.L. orbital location would be a new satellite.

8. We also find no basis for reinstatement of the application nunc pro tunc. An application that has been erroneously dismissed may be reinstated nunc pro tunc in order to enable the applicant to retain its comparative rights in a mutually exclusive hearing. *Mobile Telecommunications Corp.*, 49 RR 2d 1506, 1511 (1981). Nunc pro tunc treatment has also been used where there are exceptional public interest considerations that justify the relief requested or when substantial equities in favor of the applicant are presented. *Id.* ARC has not demonstrated that reinstatement is warranted in this case. As noted above, ARC has failed to demonstrate that its application was dismissed in error and ARC has also failed to identify exceptional public interest considerations or substantial equities in its favor to justify reinstatement.

9. The primary basis for ARC's request for reinstatement is the September 27, 1990 letter ARC states it sent to the Commission to express NASA's intention to have ARC operate TDRSS C-band capacity at the 171^0 W.L. orbital location. Preliminarily, we note there is no record that the September 27, 1990 letter was ever received by this Commission.[10] Moreover, the copy of the letter submitted by ARC contains no letterhead and was not signed and appeared to be no more than a draft letter.

10. In addition to the uncertainty surrounding the September 27, 1990 letter, we note that Division staff members contacted counsel for ARC on several occasions to convey the Commission's concern with respect to the continued pendency of the application in light of NASA's award of TDRSS capacity to Columbia. Division staff members were advised by counsel for ARC that further coordination with NASA was required and that an amendment was contemplated. Nonetheless, ARC had not filed an amendment when the application was dismissed eight and one-half months after the September 27, 1990 letter allegedly was sent to the Commission. Although ARC has explained that it could not file the amendment to its pending application until NASA decided which satellite it would use to replace TDRSS-3, we note that, if replacement of TDRSS-3 at 171^0 W.L. was a certainty, an amendment could have been filed with the stipulation that the precise numerical designation of the satellite would be provided later.

11. The additional public interest factors cited by ARC do not warrant reinstatement of its application. ARC's concern is that if the application is not reinstated, it will

[9] ARC filed an amended application with its petition for reconsideration. The amended application, which specifies that ARC will operate C-band frequencies on TDRSS-6 at 171^0 W.L., would be substituted for the original application in the event ARC's petition for reconsideration is granted.8

[10] Even if the letter were on file, ARC's recognition of the need to file an amendment to its then-pending application further bolsters the conclusion that its original application could not be granted in light of NASA's award of the TDRSS capacity at 171^0 W.L. to Columbia.

have to pay a $70,000 fee, instead of $1,000 for an amendment. We do not believe that the public interest would be served by waiving the $70,000 filing fee for ARC's amended application.[11]

12. Finally, we note that even if ARC's amended application were accepted as a "reinstatement" in place of its original application, it would also require a new public notice since it would be a major amendment involving a new satellite and would be subject to further comments and petitions as would be the case for an entirely new application. Thus, ARC could not avoid the additional time that would be necessary for the Commission to process its amended application. Moreover, the amended application would also be subject to the additional time constraints involved in technical consultation with INTELSAT under Article XIV(d) of the INTELSAT Agreement.

13. Accordingly, ARC's petition for reconsideration of the Division's Order and reinstatement of its application nunc pro tunc in the above-captioned matter is hereby DENIED.

14. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[11] ARC submitted a proposed amended application when it filed the subject petition for reconsideration. That application has never been formally accepted for filing by the Commission. ARC is actually requesting substitution of its amended application for its original application. Thus, ARC's claim that its application should be reinstated is inaccurate.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALPHA LYRACOM d/b/a PAN AMERICAN SATELLITE — File No. CSS-84-004-P-(M)

Application for modification of its licenses for its separate international satellites to authorize international private line service interconnected to the public switched networks

COLUMBIA COMMUNICATIONS CORPORATION — File Nos. CSS-92-002-ML, CSS-92-003-ML

Applications for modification of licenses for separate international satellites at 41° W.L. and 174° W.L.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: February 24, 1994; Released: March 8, 1994

By the Acting Chief, Common Carrier Bureau:

1. Alpha Lyracom d/b/a Pan American Satellite (PAS)[1] has filed an application requesting that its licenses for international separate satellites be modified to specify that such facilities may provide international private line service which can be interconnected to the public switched network (PSN).[2] The Commission also has under consideration further modifications to licenses held by Columbia Communications Corporation (Columbia) to operate the C-band transponders on the National Aeronautics and Space Administration (NASA) Tracking and Data Relay Satellite Systems (TDRSS) spacecraft located at 41° W.L. and 174° W.L.[3]

2. In this order we define the scope of private line service provided over separate satellite systems that may be interconnected to the PSN and modify the licenses of PAS and Columbia accordingly. Also, consistent with a change in Separate Systems policy, we modify the licenses for PAS and Columbia to increase the number of circuits that may be interconnected to the PSN for the provision of switched services from the current level of 100 64-kbps equivalent circuits per system to 1,250 64-kbps equivalent circuits per satellite.

BACKGROUND

3. In a letter dated November 27, 1991, the Executive Branch informed the Commission of its findings that had resulted from a further review of U.S. policy concerning international separate satellite systems.[4] The Executive Branch stated that, having taken into account the international obligations of the United States, and relevant aspects of U.S. policies regarding telecommunications, foreign relations, national security, and economic and commercial interests, it had established a goal of complete elimination of all restrictions on the interconnection of international satellite systems with the PSN by January 1997. As an interim measure, however, the Executive Branch established modified criteria to be applied by the Commission prior to final authorization of non-INTELSAT satellite facilities for international communications. The modified criteria would permit separate satellite systems to provide capacity for international private line service, as defined by the Commission, interconnected to the PSN, in addition to their existing permissible services.[5]

4. In its *Separate Systems Modification* order released April 8, 1992, the Commission adopted the modified criteria for non-INTELSAT facilities, relying on generally accepted definitions used within the industry concerning "public-switched service" and "international private line

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[1] On December 31, 1992, the Chief of the Common Carrier Bureau authorized the assignment of Alpha Lyracom's licenses for its separate international satellites and its earth station in Homestead, Florida to PanAmSat, L.P., *Alpha Lyracom, d/b/a Pan American Satellite, Alpha Lyracom Space Communications, Inc., Cygnus Satellite Corp.*, 8 FCC Rcd 376 (Com. Car. Bur. 1992).

[2] Comments were received from TRW, Inc., Columbia Communications Corporation (Columbia), American Telephone and Telegraph Company (AT&T), Communications Satellite Corporation (Comsat) and Capital Cities/ABC, CBS, NBC and TBS (collectively, the "Networks"). PAS filed reply comments. Columbia and AT&T filed comments in response to PAS' reply.

[3] In an order released October 14, 1992, the Chief, Common Carrier Bureau modified Columbia's licenses to permit it to provide all services not interconnected with public switched networks (including private line services and video and audio transmission services), up to 100 64-kbps equivalent circuits per system interconnected with the public switched network for the provision of international telecommunications services, and emergency restoration services. Columbia was also authorized to use the C-band capacity on the TDRSS satellite located at 174° W.L. for the provision of domestic service between the continental U.S., Alaska and Hawaii, on the one hand and U.S. territories and possessions located in the western Pacific. The Commission deferred action on Columbia's request to provide interconnected private line service. *See* Columbia Communications Corp., 7 FCC Rcd 6616 (1992).

[4] Letter dated November 27, 1991 from James Baker, Secretary of State and Robert Mosbacher, Secretary of Commerce to FCC Chairman Alfred Sikes (Baker-Mosbacher letter).

[5] These criteria supersede previous criteria set forth in the November 24, 1984 letter from the Executive Branch. *See* letter from George P. Shultz, Secretary of State, and Malcolm Baldridge, Secretary of Commerce, to FCC Chairman Mark Fowler (November 28, 1984).

service."[6] The Commission stated that immediate changes in the regulatory limits placed on separate systems were warranted and appropriate. Finally, the Commission delegated to the Chief, Common Carrier Bureau authority to make the necessary modifications in the authorizations of separate systems providers upon a specific request.

DISCUSSION

5. Several interested parties filed comments in response to the subject PAS application and raised issues regarding interconnected private line service that the *Separate Systems Modification* order had not addressed. In addition, the Bureau must further narrow the Commission's definition of "international private line service" in order to implement the Executive Branch's modified criteria for the separate systems policy and to ensure consistency with INTELSAT's definition of "non-switched traffic." The provision of interconnected private line service would also have to be consulted under Article XIV(d) of the INTELSAT Agreement.[7] In this order, we define the scope of private line service that may be interconnected to the PSN and resolve the questions raised in the comments regarding regulatory requirements for this service.

6. *The Need for Interconnected Private Line Circuits.* The Networks, TRW and Columbia support the lifting of restrictions on the interconnection of private lines provided over separate systems to the PSN and urge the Commission to grant PAS's application as a way to increase competition in the private line service market. Columbia asserts that, with the widespread use of private branch exchange equipment and the impracticality of customers' having two separate telephones on their desks, the PSN interconnection restriction has severely limited the ability of separate satellite systems to compete in the provision of private line services. According to Columbia, private line customers want the ability to use a single system of customer premises equipment (both telephone and computer) to access a mix of switched and non-switched telecommunications services. TRW, which has been granted conditional authority to establish its own separate system and is the lessee of international satellite capacity on a currently licensed separate satellite system, also cites the needs of customers to provide a mix of switched and non-switched telecommunications services over common international facilities. The Networks state that interconnected private line circuits are important for coordination and control of international satellite television transmissions.

7. The Commission has long permitted end users to interconnect private lines to the PSN for their own use. The comments attest to the need users of separate satellite systems have to use a single system to satisfy their requirements for non-switched and switched telecommunications. Users of private lines provided over separate systems could not satisfy their own requirements because of restrictions against interconnecting private lines to the PSN. Allowing customers of separate satellite systems to interconnect their private lines with the PSN will promote increased choice of services and suppliers and more flexibility to tailor communications service offerings to specific user needs. We thus conclude that the policy underlying the Executive Branch's modified criteria permitting the interconnection of private lines provided over separate systems to the PSN is fully consistent with existing Commission policy.[8]

8. *Definition of Interconnected Private Line Service.* In considering the definition of private lines that can be interconnected to the PSN, we note that the Baker-Mosbacher letter cited former § 43.61(a)(6) in defining a private line. That section required that the customer have exclusive use of the private line (*see supra* note 6). In its *Separate Systems Modification* order, the Commission relied on generally accepted definitions and defined "international private line service" as "making dedicated international telecommunications circuits available to a customer for the customer's use." Subsequently, at its 18th Assembly of Parties meeting, INTELSAT set forth its position concerning the distinction between switched and non-switched traffic by defining non-switched traffic to include private line traffic, even where such private line is interconnected to the PSN, but only where the users of such line are limited to a predetermined group of users, and the line is not available for use by the general public.

9. We believe that the INTELSAT definition for interconnected private line service is consistent with the Executive Branch's modified criteria and the Commission's *Separate Systems Modification* order. It is clear from the above definitions that the concept of interconnected private line service in the context of our Separate Systems policy contemplates some limit on persons who may access a private line. Indeed, the *Separate Systems Modification* order noted that a customer may combine a series of private circuits to establish an international private leased circuit telecommunications network, which corresponds with INTELSAT's use of the term "group of users." On the other hand, the Executive Branch's definition does not require that the customer, which could also be a group of users, be "predetermined."

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[6] Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT), 7 FCC Rcd 2313 (1992) (*Separate Systems Modification* order), *recon. denied*, 8 FCC Rcd 5122 (1993). The Commission relied on generally accepted definitions because § 43.61 (a)(6) of the Commission's Rules, which was cited in the Baker-Mosbacher letter, had been modified and all definitions had been deleted. Prior to its deletion, § 43.61 (a)(6) defined private line or leased channel service to mean "the leasing of a channel of communication on a contract-time basis for the purposes of a customer-operated closed circuit overseas telecommunication line, over which the customer has exclusive use, between the office of the customer and the office of a particular overseas correspondent of the customer."

[7] Article XIV(d) of the INTELSAT Agreement requires a Party or Signatory that intends to establish, acquire or use space segment facilities separate from INTELSAT space segment facilities to meet its international public telecommunications services requirements to consult with the INTELSAT Assembly of Parties, through the Board of Governors, to ensure technical compatibility with the INTELSAT system and to avoid significant economic harm to the INTELSAT system.

[8] *See Regulation of International Accounting Rates*, CC Docket 90-337, Phase II, First Report and Order, 7 FCC Rcd 559, 560 (1992) (*International Resale Decision); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom. American Telephone and Telegraph Company v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978).

10. While the use of the term "predetermined" could suggest that access to the interconnected private line be limited to those persons who have been identified previously, such a limitation would be more restrictive than the Executive Branch's requirement that the circuit be for the customer's own use. For example, requiring that all persons or locations that may be accessed be identified beforehand may prevent users from promptly implementing changes in their service requirements. Such a limitation would also prevent a private line customer from using the line to conduct its business with persons or entities that have not been identified in advance. Moreover, such a limitation would prevent persons desiring to transact business with the private line customer from using that customer's interconnected private line to reach the customer. Although members of the general public could access the interconnected private line in furtherance of business with the private line customer, the private line would not be available for their use to access the general public. Thus, we believe that the determining factors should be whether the interconnected private line service will be for the customer's own use and whether the private line would be used to provide access to the general public by persons other than the customer. Therefore, we define "interconnected private line service" to mean "making dedicated international telecommunications circuits available to a customer for that customer's use; provided that when such service is interconnected with the PSN, persons other than the customer cannot use the circuits to access the general public."

11. We recognize that this definition may be broader than INTELSAT's definition of non-switched services. Our definition gives greater flexibility to the interconnected private line customer in recognition of marketplace realities. It is not so broad, however, that it makes the private line available for access to the general public by persons other than the customer, which appears to be INTELSAT's main concern. Thus, we view our definition as consistent with INTELSAT's definition and policy, and we do not believe that further consultation with INTELSAT is necessary.

12. *Resale of Interconnected Private Line Service.* The comments in response to PAS's application also questioned whether such interconnected private lines could be resold. Although Comsat supports permitting private lines provided over separate systems to interconnect with the PSN, it questions whether resale of separate systems' interconnected private line circuits to third parties would be permitted. Comsat argues that if resale is permitted, the Commission must make it clear that the use of separate systems' private line circuits to provide International Message Telephone Service (IMTS) is prohibited. To hold otherwise, asserts Comsat, would circumvent the international accounting and settlements process and would violate the clear terms of the Executive Branch policy. PAS, on the other hand, argues that nothing in the Baker-Mosbacher letter precludes separate satellite systems from providing PSN interconnected private lines to carriers or resellers.

13. The Baker-Mosbacher letter does not address the issue of resale. Moreover, there is no general prohibition against the resale of communications services and we do not view previous statements by the Executive Branch concerning Separate Systems policy or the Baker-Mosbacher letter as generally precluding resale of lines provided over separate systems, including those that may be interconnected with the PSN. Our conclusion in this regard is generally consistent with Commission policy encouraging international resale.[9]

14. We conclude, however, that the Baker-Mosbacher letter does not contemplate resale of interconnected private lines for the provision of public switched services. At present, the Separate Systems policy permits the interconnection with the PSN of up to 1,250 64-kbps circuits per satellite for the provision of public switched telecommunications services. The 1,250 circuit total represents the most recent modification in the Separate Systems policy which initially did not permit any interconnection with the PSN. The Baker-Mosbacher letter set forth a goal of complete elimination of all restrictions by January 1997. In its *Separate Systems Modification* order, the Commission established a sunset date of January 1, 1997, for the complete elimination of all such restrictions.

15. It is clear that the Baker-Mosbacher letter contemplated that some restrictions on the number of circuits that can be interconnected to the PSN for the provision of public switched service would remain until 1997, subject to further modifications of the policy prior to 1997. Since there is no limit on the number of private line circuits that can be interconnected with the PSN, permitting the resale of such lines for the provision of public switched service would, in effect, circumvent the Executive Branch restrictions on the number of circuits that could be interconnected to the PSN for the provision of public switched service.[10] This conclusion is further supported by the Executive Branch's reliance on former § 43.61(a)(6) of the Commission's Rules to define a private line. That section provided that a customer have exclusive use over the private line. If resale of private lines for the provision of public switched service is permitted, the result would be unrestricted interconnection of circuits provided over separate satellite systems with the PSN, a circumstance over which a customer could not exercise exclusive control. Therefore, we will not permit the resale of international private lines over separate systems for the provision of public switched services. Furthermore, we will require all common carriers to amend their private line tariffs to prohibit the resale of private lines over separate systems for the provision of public switched services.

16. We believe that the restriction on the number of circuits that may be interconnected to the PSN will not be affected by the resale of interconnected private line circuits over separate satellite systems for the provision of private line service. Such resale would not allow circumvention of the Executive Branch's restriction, since the resulting service would be the provision of interconnected private lines

[9] *See International Resale Decision*, 7 FCC Rcd at 560-562.

[10] The Commission's policy favoring the resale of private lines is conditioned on steps being taken to ensure that such resale does not result in the unilateral diversion of U.S.-inbound switched traffic to private lines, thereby exacerbating the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines for the provision of switched and interconnected private line services only to those countries which afford equivalent resale opportunities. *See International Resale Decision, supra* note 8.

as defined in this order. Therefore, we permit the resale of interconnected private line circuits over separate satellite systems for the provision of private line service.[11]

17. *Appropriate Regulatory Mechanisms.* Although AT&T supports the use of non-INTELSAT facilities for international communications, it believes that the Commission must impose on PAS and other separate system operators the same obligations as those applicable to U.S. common carriers with respect to their interconnection of international private lines to the PSN. The obligations would include a demonstration by separate systems operators that equivalent opportunities exist for U.S. customers to interconnect to the PSN in the foreign country where the private line originates.[12] AT&T believes these requirements are necessary to guard against the negative impact resulting from one-way private line interconnection arrangements that allow only inbound switched capability into the U.S. According to AT&T, one-way interconnection drains the settlement revenues U.S. carriers receive, bypasses the accounting rate process, and increases the settlements outpayments U.S. carriers make to the foreign administration. Thus, AT&T believes that equivalency for foreign customer interconnection arrangements is as important as equivalency for interconnection arrangements by resellers since the result would be the same whether the interconnection arrangement is made for a customer located in a foreign country or a reseller, and whether the private line is provided by a common carrier, separate satellite system, or a private cable company.

18. The Networks state that equivalency requirements are only applicable to resale of private line circuits and that the issues raised by AT&T are not applicable to the control and coordination circuits associated with international television transmissions. Since their provision of such circuits will not cause any discernible shift in usage from international switched services to private lines, they believe the Commission should implement the modified criteria immediately.

19. As an initial matter, the Commission noted in its *Reconsideration Order* that separate satellite systems are regulated as non-common carriers, and that any common carrier that acquires capacity directly from a separate satellite system for use in offering its own common carrier services, such as international private line service, is regulated as a facilities-based carrier. Under the Commission's international resale policy, therefore, such a common carrier would not be engaged in resale and is therefore not required to show equivalency before providing service over separate satellite system facilities. The Commission noted that a common carrier that wishes to resell the common carrier services of another carrier would be subject to the equivalency requirement, regardless of whether the underlying facilities are common or non-common carrier.[13]

20. We conclude that the record in this proceeding does not justify imposing an equivalency requirement or an ISP filing and notification process on the interconnection of end user international private lines provided by separate satellite system operators. We believe that imposing the proposed equivalency requirement could harm both the ability of U.S. businesses to compete globally, as well as the competitiveness of separate satellite systems. Finally, we note that there is no specific evidence on the record that current interconnections of end user private lines are pervasive and are having a significant adverse impact on our international settlements policies.

21. We will require as a condition of these licenses, however, that separate satellite system operators file notification of all their arrangements for the interconnection of private lines, including those for end user private lines, at any U.S. carrier's premises.[14] The notification requirement will enable us to review effectively both the number and the type of end user private lines interconnected at carriers' premises. This information concerning the number and type of interconnected end user private lines will provide some data on what, if any, impact they may have on our international settlements policies. We also find that this notification requirement enhances our ability to monitor interconnected end user private lines to ensure consistency with our definition of "international private line service" and with the Executive Branch restriction on private line circuits that can be interconnected to the PSN for the provision of public switched services.

22. *Other Issues.* During the pendency of the subject applications, the Executive Branch has further modified the separate satellite systems policy. In a letter dated January 8, 1993 from the Departments of State and Commerce, the Commission was notified that the Executive Branch had modified some of the criteria articulated in the November 27, 1991 letter.[15] Specifically, the Executive Branch

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[11] Resale of interconnected private line circuits for the provision of private line service remains subject to the Commission's policy on international private line resale. *See id.* For the reasons stated in paragraph 19, however, any common carrier that acquires capacity directly from a separate satellite system for use in offering its own common carrier services is not engaged in resale and is therefore not required to show equivalency before providing service over separate satellite system facilities.

[12] Specifically, AT&T believes the Commission should require PAS: 1) to file under Section 43.51 all arrangements for interconnections of international private lines to the PSN; 2) to file a waiver under the International Settlements Policy (ISP) rules to notify U.S. carriers serving the foreign country from which the private line will originate of its intention to make interconnection of the private line to the PSN; and 3) to demonstrate in the ISP waiver, prior to implementation of the private line arrangement, that U.S. customers are afforded equivalent opportunities to interconnect international private lines to the PSN in the foreign country. AT&T also states that the ISP filing will provide the procedural mechanism for PAS's demonstration that the equivalency test is met.

[13] *See Reconsideration Order*, 7 FCC Rcd at 7931.

[14] To address possible concerns over the disclosure of commercially sensitive, confidential or proprietary information, however, we require separate satellite systems to fulfill their notification requirements for end user interconnection agreements by filing only information concerning the number and type of private lines involved (*e.g.* 64-kbps circuit), the country of origin and the duration of the agreement. We believe that requiring U.S. separate satellite system operators to file only this information adequately addresses any end user concerns over disclosure of commercially sensitive, confidential or proprietary information, while still providing us with the necessary information.

[15] Letter dated January 8, 1993 from Bradley P. Holmes, United States Coordinator for International Communications and Information Policy, Department of State and Gregory L. Chapados, Assistant Secretary for Communications and Information, Department of Commerce to FCC Chairman Alfred C. Sikes.

has determined that interconnection of international separate satellite systems with the public switched network at a level up to 1,250 64-kbps equivalent circuits per satellite for the provision of public switched services is consistent with U.S. telecommunications and foreign policy interests. Prior to this modification, international separate satellite systems could provide up to 100 64-kbps equivalent circuits per system.[16]

23. The Executive Branch noted that the modification with respect to 1,250 64-kbps equivalent circuits per satellite will align U.S. policy with the decisions of the INTELSAT Assembly of Parties at its meeting held November 3-6, 1992 which determined that switched services up to the level of 1,250 equivalent circuits per satellite would not cause significant economic harm to the INTELSAT system. In an Order released January 6, 1994, the Commission determined that raising the number of circuits that can interconnect with the PSN is in the public interest and delegated to the Bureau authority to implement the 1,250 circuit exception to the non-interconnection restriction as well as future changes in the number of circuits that can interconnect with the PSN.[17]

24. In light of the Commission's action, we hereby modify the licenses of PAS and Columbia to make available 1,250 64-kbps equivalent circuits per satellite for the provision of switched services interconnected with the PSN. As the Commission noted, increasing the number of circuits will make separate satellite systems more competitive with common carrier systems and is consistent with the U.S. international obligations under the INTELSAT Agreement.

ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that PAS's application, File No. CSS-84-004-P-(M), for modification of its licenses for separate international satellites IS GRANTED, and PAS is authorized to provide over its system all services not interconnected with the PSN (including private line services and video and audio transmission services), up to 1,250 64-kbps equivalent circuits per satellite for the provision of international public switched telecommunications services, emergency restoration services and private line service interconnected to the PSN as defined and conditioned herein.

26. IT IS FURTHER ORDERED that Columbia's applications, File Nos. CSS-92-002-ML and CSS-92-003-ML ARE GRANTED, and Columbia is authorized to provide over its system all services not interconnected with the PSN (including private line services and video and audio transmission services), up to 1,250 64-kbps equivalent circuits per satellite for the provision of international public switched telecommunications services, emergency restoration services and private line services interconnected to the PSN as defined and conditioned herein.

27. IT IS FURTHER ORDERED that any common carrier that seeks to use PAS's or Columbia's system for the provision of common carrier services not previously authorized over those systems must file a new Section 214 application for use of those satellites.

28. IT IS FURTHER ORDERED that all common carriers providing private line service via facilities obtained from separate satellite system operators shall amend their private line tariffs to prohibit the resale of such private lines for the provision of public switched services. Common carriers should file these tariff revisions within sixty days of the release date of this order to become effective on thirty-five days' notice.

29. IT IS FURTHER ORDERED that PAS and Columbia must file with the Commission, within thirty (30) days of execution, any arrangement, agreement or contract with an end user for the interconnection of private lines to the public switched network at a carrier's premises, including only the information contained in such arrangements, agreements or contracts pertaining to the number and type of private line circuits involved, the country of origin, and the duration of the agreement.

30. This order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

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[16] Letter dated December 14, 1990 from Thomas J. Murrin, Assistant Secretary of Commerce and Lawrence S. Eagleburger, Deputy Secretary of State to FCC Chairman Alfred C. Sikes.

[17] Permissible Service of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization, FCC 93-536 (released January 6, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WilTel International, Inc. File No. I-T-C-93-281

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide international common carrier services as a reseller

ORDER AND CERTIFICATION

Adopted: February 25, 1994; Released: March 8, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application,[1] filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international private lines for the provision of international private line services to the general public by WilTel International, Inc.(WilTel).[2]

2. Accordingly, IT IS ORDERED that application File I-T-C-93-281 IS GRANTED and WilTel is authorized to resell international private lines not interconnected to the public switched network for the provision of international private line services[3] between the United States and each of the forty-eight (48) international points specified in Appendix A.[4]

3. IT IS FURTHER ORDERED that WilTel is authorized to lease and operate one-half interest in up to 717 DS-0 circuits from authorized U.S. common carriers[5] for the provision of its authorized resale of international private lines for private line services, as specified in Appendix A.

4. IT IS FURTHER ORDERED that our authorization of WilTel to resell international private lines for the provision of non-interconnected private line service is limited to the provision of such private line service only between the United States and each of the international points listed in Appendix A -- that is, private lines which carry traffic that originates in the United States and terminates in one of the international points in Appendix A, or originates in one of the international points listed in Appendix A and terminates in the United States. In addition, WilTel may not -- and WilTel's tariffs must state that WilTel's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice*

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[1] WilTel intends to provide point-to-point and multi-point private line and virtual private line services for the transmission of voice, data, facsimile and video communications. It does not intend to interconnect any of these private line services to the public switched network. *See* Application at 2. *See also* Letter, dated February 15, 1994 from John C. Gammie, Attorney, WilTel International, Inc. to Jennifer Warren, International Facilities Division, Common Carrier Bureau.

[2] WilTel International, Inc. is wholly-owned by Williams Telecommunications Group, Inc. (WTGI), which is in turn wholly-owned by The Williams Companies, Inc., a publicly held corporation. WTGI also owns WilTel, Inc. which currently provides domestic and international services. WilTel International, Inc. also operates facilities formerly owned by Vyvx Telecom, Inc., WTG-East, Inc. and WTG-West, Inc.

[3] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not result in the unilateral diversion of U.S. inbound switched traffic to private lines, and thus, exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (Phase II Third Further Notice), 7 FCC Rcd 7927 (1992).)

[4] We note that should WilTel obtain any interest in facilities beyond the authorized forty-eight international points for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for WilTel to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[5] WilTel will either lease the private lines pursuant to the identified tariffs or contract with the following carriers: AT&T Tariff FCC No. 9, IDB/WorlCom FCC Tariff No. 1, MCI/WUI FCC Tariff No. 27, Pacific Gateway Exchange FCC Tariff No. 2, U.S. Sprint Communications Co. FCC Tariff No. 7. *See* Letter, dated February 23, 1994, from John Gammie, Attorney, Wiltel International, Inc. to Jennifer Warren, International Facilities Division, Common Carrier Bureau.

of Proposed Rulemaking (Third Further Notice), 7 FCC Rcd 7927 (1992), *fONOROLA/EMI Order*, 7 FCC Rcd 7312 (1992), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that neither WilTel nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which WilTel or any such persons or companies controlling or controlled by WilTel are parties.

6. IT IS FURTHER ORDERED that

(a) WilTel shall file publicly any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. §203, and the *Interexchange Order*;[6]

(b) the services obtained by WilTel shall be made generally available to similarly situated customers at the same terms and conditions and rates; and

(c) WilTel shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that WilTel shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that WilTel shall file semi-annual reports of circuit additions, pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. IT IS FURTHER ORDERED that WilTel shall file with the Commission a copy any operating agreement it enters into with its foreign correspondents within thirty (30) days of execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

10. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

11. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services WilTel seeks authority to provide. The transmission of money is not considered to be a common carrier service.

12. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[6] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991) (*Interexchange Order*).

APPENDIX A

Country	DS-0 Circuits
Argentina	5
Australia	30
Bahamas	3
Belgium	4
Brazil	8
Canada	192
Chile	2
China	2
Columbia	6
Costa Rica	2
Denmark	2
Dominican Republic	6
Ecuador	2
Egypt	2
El Salvador	3
France	30
Germany	60
Greece	4
Guatemala	3
Haiti	1
Hong Kong	7
India	5
Indonesia	2
Ireland	4
Israel	6
Italy	11
Jamaica	3
Japan	30
Korea	12
Mexico	76
Netherlands	6
New Zealand	6
Pakistan	3
Panama	3
Peru	3
Philippines	9
Poland	3
Saudi Arabia	13
Singapore	3
Spain	6
Sweden	8
Switzerland	6
Taiwan	10
Thailand	3
Trinidad	3
Turkey	2
United Kingdom	101
Venezuela	5

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EMI Communications Corporation — File No. I-T-C-93-303

Application for a Certificate of Public Convenience and Necessity Pursuant to Section 214 of the Communications Act of 1934, As Amended, to Provide Facilities-Based International Communications Service Between the United States and Canada

ERRATUM

Released: March 8, 1994

By the Chief, International Facilities Division:

1. On January 7, 1994 the Common Carrier Bureau released an Order and Certificate in the above-captioned proceeding (DA 93-1578). This Erratum corrects paragraph 2(b) of the January 7 Order and Certificate as follows:

b. use said facilities to provide dedicated and switched voice, data and facsimile services between the United States and Canada. (Footnote omitted).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 1, 1994

Released: March 9, 1994

Mr. Rush Dye
Dye's Cab
159 South College Street
Pikeville, KY 41501

Dear Mr. Dye:

This is in response to your letter of October 19, 1993, in which you express concern about the methods used to inspect your CB radio station that is located in your taxicab. Thank you for settling the monetary forfeiture. That matter is now closed.

We checked with the inspector who visited you. He claims that the linear amplifier in your taxicab was visible through the window of the vehicle. He denies having opened the door of the vehicle to inspect the equipment in your absence. He claims that the inspection was performed only in your presence and the vehicle was opened only after he had requested permission from you to do so and after you had unlocked the door to permit him to enter. Your allowing him to enter your vehicle and make the inspection was in full compliance with the rules. [1]

The use of linear amplifiers at CB stations is not permitted under *any* circumstances. Section 95.411 (CB Rule 11) states: "(a) You may not attach the following items (power amplifiers) to your type-accepted CB transmitter in any way: (1) External radio frequency (RF) power amplifiers (sometimes called linears or linear amplifiers); or (2) Any other devices which, when used with a radio transmitter as a signal source, are capable of amplifying the signal. (b) There are no exceptions to this rule and use of a power amplifier voids your authority to operate the station..."

We understand that you cover a large area and that communications are difficult at the edge of your service area. Nevertheless, use of linear amplifiers as a means of extending the range of communications *cannot* be allowed. There are a few frequencies available that are reserved for exclusive use by taxicabs. In metropolitan areas, those frequencies are very congested. However, in a small town away from large metropolitan areas, they should be relatively free of interference and usually enable reliable communications over a larger area than can be covered by a CB station.

Your town was selected for the inspector's visit as part of a "zip code survey". The Commission's staff is too small to visit all towns and cities on a regular basis. Certain zip codes are selected at random and the towns in those zip code areas are visited. Your station was selected for inspection because it was located in a targeted zip code area and the antennas of your station were readily visible. Since your town is distant from our inspector's home office, his time was quite limited. He was able to visit only a few of the stations in your town.

Thank you for bringing these matters to our attention.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

[1] Section 95.426 (CB Rule 26) states: (a) If an authorized FCC representative requests to inspect your CB station, you must make your CB station and records available for inspection. (b) A CB station includes all of the radio equipment you use.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 18, 1994

EFFECTIVE DATE OF RULES GOVERNING CARRIAGE AGREEMENTS BETWEEN MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTORS AND VIDEO PROGRAMMING VENDORS

In the Commission's *Second Report and Order* in MM Docket 92-265, 58 FR 60390 (November 16, 1993) rules were adopted regarding carriage agreements between multichannel video programming distributors and video programming vendors. The necessary Office of Management and Budget forms clearance having now been obtained, the effective date for the rule amendments adopted has been established as January 26, 1994.

The Commission adopted the *Second Report and Order* on September 23, 1993, and designated an effective date of January 10, 1994, predicated on the necessary forms clearance having been obtained by that date. The decision, in response to the Cable Television Consumer Protection and Competition Act of 1992, established regulations governing program carriage agreements between multichannel video progamming distributors and video programming vendors. Included in this action was adoption of complaint procedures requiring approval by the Office of Management and Budget. That approval was received on January 26, 1994. Accordingly, the January 10, 1994, effective date for 47 CFR Sections 76.1300-1302 (carriage agreement provisions) is revised to January 26, 1994.

For more information contact Diane L. Hofbauer, Cable Services Bureau, (202)416-0807.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 7, 1994

FCC ASKS FOR COMMENTS REGARDING THE ESTABLISHMENT OF AN ADVISORY COMMITTEE

The Commission is considering the establishment of a Federal Advisory Committee to assist the Common Carrier Bureau (Bureau) in the development and implementation of an electronic filing system. This Committee would be created under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2.

The proposed advisory committee would be convened to provide recommendations to the Bureau to be used in the formulation of rules and procedures that will facilitate the electronic filing of Bureau applications, formal complaints, various reports, petitions and tariff filings and related pleadings and reports that are filed in conjunction therewith. Committee recommendations would also be considered in ongoing discussions regarding Commission-wide electronic filing initiatives. Specifically, the committee will assist the Bureau in 1) designing the technical software necessary to receive, store and retrieve reports, applications and related filings; 2) studying the feasibility of establishing an on-line public access system to the database necessary to accomplish this goal, using, where possible, readily available, off-the-shelf software; 3) analyzing and identifying the costs of implementing and maintaining such a system, and the feasibility of recovering such costs through user fees or other means, in conjunction with the President's goal of providing efficient and easy to use public access to government information, and 4) designing and developing a final request for proposal that the Commission could use in implementing an electronic filing system.

The Commission requests public comment, by April 1, 1994, whether it should establish a federal advisory committee, and the proposed scope of that committee's deliberations. Comments should be sent to the Office of the Secretary, CC Docket 94-18, Federal Communications Commission, Washington, D.C. 20554.

Action by the Commission, March 2, 1994, by Public Notice (FCC 94-44). Chairman Hundt, Commissioners Quello and Barrett.

For further information pertaining to the establishment of this advisory committee, contact Jim Talens at (202) 632-3214, Rosalee Chiara at (202) 634-1781 or Kristi Kendall at (202) 634-7058.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Eagle Radio, Inc. File No. BRH-900402ZG

For Renewal of License of
Station KEGL(FM)
Fort Worth, Texash

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 1994; Released: March 4, 1994

By the Commission:

1. On February 1, 1994 the Commission released a decision acting upon the license renewal application for station KEGL(FM).[1] Our decision found that KEGL violated our Equal Employment Opportunity (EEO) requirements, issued a Notice of Apparent Liability for a $18,750 forfeiture, and renewed KEGL's license for a short term subject to EEO reporting conditions. In arriving at this result, we addressed a joint petition filed by the NAACP and the National Black Media Coalition. However, we inadvertently failed to consider informal objections filed by Al Wescott and Tom Blackwell, and a separate document in which the NAACP comments on the Wescott and Blackwell objections.[2] So that we may address the Wescott and Blackwell filings, we hereby reconsider the KEGL decision on our own motion. *See* 47 C.F.R. § 1.108. Upon that reconsideration, however, we conclude that the allegations of Wescott and Blackwell do not raise any substantial and material question of fact requiring resolution in a hearing and, therefore, we affirm our grant of KEGL's license renewal.

Wescott Objection

2. Westcott is the author of a series of past complaints against various broadcast stations alleging the broadcast of indecent language during the "Howard Stern Show." Some of these complaints have named KEGL, while others have not. None of these complaints, however, appear to be based upon Westcott's personal knowledge of programming aired by KEGL. Rather, during the period relevant here, Westcott personally heard and recorded the assertedly indecent material cited in these complaints as it was aired by KFBI-FM in Pahrump, Nevada. Westcott apparently assumes that material aired during the "Howard Stern Show" as broadcast by KFBI-FM was necessarily broadcast by KEGL. There is no basis in the record for this assumption where, as here, the station charged with a violation is an independent editorial entity carrying the cited programming by contractual arrangement with its producer and there is no evidence to corroborate that the particular passages claimed by the complainant to be indecent were in fact aired by KEGL. Under these circumstances, we do not believe that further action on Westcott's informal objection is warranted.

Blackwell Objection

3. Blackwell's objection states that he supports the separate objections filed by the NAACP and by Wescott. Blackwell also raises several additional categories of arguments against renewal of KEGL's license.

4. *Misconduct By KEGL Employees.* Blackwell's primary category of arguments concern the actions of KEGL's Chief Engineer and one of the station's disc jockeys in their capacities as ham radio operators. Blackwell alleges that the KEGL employees, via a repeater located atop KEGL's building, made racist, harassing, and indecent remarks over amateur radio frequencies. He also alleges, without specifying the method used, that the employees electronically jammed the signal of an FM radio station which competes with KEGL and engaged in several high-tech pranks against the competitor and Blackwell.[3] Finally, Blackwell alleges that the employees made false statements or attempted to cheat on FCC amateur radio license exams. Blackwell does not allege that the licensee itself was involved in any of these matters but indicates that the station should be responsible for actions of its employees. The licensee responds that Blackwell has not shown any of the matters alleged attributable to the licensee's actions.

5. The Commission finds it of utmost importance that broadcasters maintain effective control over station operations and personnel. *Trustees of University of Pennsylvania*, 69 FCC 2d 1394, 1396-97 (1978). Consistent with this requirement, we will hold a broadcast licensee responsible for rule violations by station employees acting within the scope of their employment. *See generally Pacifica Foundation*, 95 FCC 2d 750, 764 (1983). The matters alleged here, however, appear to concern the actions of station employees acting as individuals. The only alleged connections between KEGL and the described incidents are (1) that KEGL may have allowed a station employee to locate an amateur repeater (owned by the employee) on the roof of the KEGL building; and (2) that the station's Chief Engineer may have used a telephone in KEGL's building to call Blackwell prior to a prank which allegedly was engineered from a different location. This, without more,

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[1] *Memorandum Opinion and Order and Notice of Apparent Liability*, FCC 94-17, 9 FCC Rcd (released February 1, 1994). That decision also acted upon the license renewal applications of seven other Texas radio stations which are not affected by our action herein.

[2] The NAACP's comments on the Wescott and Blackwell objections address an issue separate and distinct from those raised in the NAACP's own Petition to Deny.

[3] The jamming allegedly resulted in the broadcast of a tape of racial slurs and expletives on the competitor's frequency. Someone also allegedly changed the competing station's telephone answering machine message so that callers were told to call KEGL instead. There are numerous allegations of harassing pranks directed at Blackwell. For example, Blackwell's telephone number was entered into pocket pagers resulting in numerous unwanted telephone calls to him at all hours. Such actions, however, have not been linked with KEGL's licensee. Additionally, the allegations of telephone harassment would not appropriately be handled by this Commission in the first instance. Allegations of telephone harassment are best resolved in a civil lawsuits for invasion of privacy, or in criminal cases brought by the U.S. Attorney or local law enforcement officials. *See Elimination of Unnecessary Broadcast Regulation*, MM Docket No. 83-842, 54 RR 2d 1043, 1055 (1983).

does not establish a sufficient nexus between the alleged actions of the individuals and their employment at KEGL. Thus, while we do not condone the actions described by Blackwell, the alleged employee misconduct would not establish a basis for action against KEGL's licensee. We did, however, refer these matters to our Private Radio Bureau (which oversees amateur radio operations) and to our Dallas Field Office (which investigates allegations of radio interference) for their consideration of the allegations as they relate to the individuals.[4]

6. *Programming Allegations.* Blackwell's other allegations concern KEGL's programming. He quotes excerpts of letters in KEGL's public file in which listeners complain about program content they considered to be in poor taste.[5] He also includes transcripts of allegedly indecent and/or racist material which he himself heard on the station. Blackwell also alleges that the station violates copyright laws by altering music, that it aired personal attacks against Mr. Wescott and others, and that it announced pre-recorded material as being aired live.

7. In view of the First Amendment rights of broadcasters and the noncensorship provision of the Communications Act, the Commission rarely interferes with a licensee's programming decisions. *See* 47 U.S.C. § 326. With certain limited exceptions prescribed by rule or statute, we afford licensees substantial discretion over the programming they present. *See Mahoning Valley Broadcasting Corp.*, 39 FCC 2d 52, 58 (1972).

8. Most of Blackwell's programming allegations, if true, would fall within the licensee's discretion or outside the jurisdiction of this Commission. With respect to offensive or racist statements made on air, for example, we would not interfere because "if there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial."[6] *Anti-Defamation League of B nai B rith*, 4 FCC 2d 190, 192 (1966), *aff'd* 6 FCC 2d 385 (1967). Allegations of copyright infringement fall outside our jurisdiction. Such allegations against broadcasters are most appropriately resolved through private litigation initiated by the copyright owner. With respect to the alleged broadcast of personal attacks, we do not prohibit such attacks. Pursuant to our personal attack rule, however, we do under certain circumstances require that persons attacked be given an opportunity for response. 47 C.F.R. § 73.1920. Blackwell has not shown that the station violated our personal attack rule. The rule only covers attacks on a person's honesty, character, or integrity during discussions of controversial issues of public importance. Blackwell alleges insults to intelligence and physical appearance[7] and does not allege that such attacks occurred in connection with discussions of controversial issues of public importance.

9. Blackwell's allegation that KEGL misrepresented taped material as being aired live falls within the scope of our rules but Blackwell does not make a *prima facie* case of a rule violation. We require broadcasters to announce that material is taped if the program makes an affirmative attempt to create the impression that it is occurring simultaneously with the broadcast. 47 C.F.R. § 73.1208. Blackwell alleges that KEGL violated this rule by making it appear that a taped interview with musicians was live. His allegations, however, are based only on hearsay statements of others which do not directly support his allegations, and on his own non-expert perceptions of whether the interview sounded edited. Accordingly, we do not find these allegations actionable.[8]

10. With respect to Blackwell's allegations that KEGL aired indecent programming during the "Howard Stern Show", we have reviewed the transcript supplied and conclude that, even assuming that the material as reported in Blackwell's objection can be corroborated and was aired by KEGL, it would not raise a substantial and material question of fact concerning the licensee's basic qualifications and does not therefore constitute a basis for reversing or modifying our prior renewal grant.[9]

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[4] The Private Radio Bureau determined that only one of the matters that fell within their jurisdiction alleged warranted action. With respect to that matter (the alleged cheating on Amateur Radio exams) the Private Radio Bureau advised persons preparing and administering such exams that they should use hypothetical rather than known call signs as exam answers. The matters referred to the Dallas Field Office are still under consideration by that Office.

[5] Blackwell alleges that he was required to show identification prior to being allowed to see the public file. This is not *per se* a violation of FCC rules. Blackwell has not shown, for example, that the identification requirement served to deny public access to the file. In any event, the public file allegation would not be sufficient to warrant non-renewal of the station's license. *See generally Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2137 (Rev. Bd. 1987), *aff'd* 4 FCC Rcd 2553, *recon. denied* 4 FCC Rcd 6312 (1989).

[6] The NAACP commented separately on Blackwell's allegations about racist program material. In those comments, the NAACP alleges that there may be a connection between the programming allegations and the station's poor EEO record. The NAACP states that, regardless of any First Amendment protection afforded to racist speech, use of such speech at a station could create a hostile work environment and, thus, lead to employment discrimination. We make no judgment on the underlying merits of the NAACP's position because it has not provided a sufficient factual basis for its legal conclusions. The only alleged racist broadcasts on KEGL were several parodies of Christmas carols as they would be sung by "the Marge Schott Choir." Shortly before these broadcasts, Mrs. Schott, owner of the Cincinnati Reds baseball team, was publicly accused of making racist statements about members of her team. The timing and limited duration of the KEGL broadcasts and the context in which they were aired persuade us that the cited program material is insufficient to establish the alleged causal link between the station's programming and its EEO record. The Blackwell objection also contains allegations of racist statements by a KEGL employee, but the NAACP's reliance on those allegations as evidence of a potentially hostile workplace is also misplaced given that the alleged statements were made to non-employees in conversations outside the workplace.

[7] Blackwell alleges that KEGL aired programs in which individuals were called by such derogatory names as "dope," "nit-wit," "moron," "ugly freak," "jealous little slime," and "imbecile with a billy goat beard."

[8] Further, an isolated non-hoax, non-news violation of our rule on taped material would not generally prevent renewal of a station's license. *E.g., Lincoln Dellar*, 8 FCC Rcd 2582, 2584 (ASD 1993) (pre-recorded morning traffic reports over a two-week period resulted in admonishment but not non-renewal).

[9] Our action here is without prejudice to whatever enforcement action, if any, we may deem necessary with respect to the allegedly indecent programming aired by KEGL.

11. Accordingly, IT IS ORDERED that the informal objections of Tom Blackwell and Al Wescott against the license renewal application of Station KEGL(FM) ARE DENIED.

12. IT IS FURTHER ORDERED that our grant of the license renewal application for Station KEGL(FM) IS AFFIRMED WITHOUT PREJUDICE to whatever action, if any, may be appropriate with respect to the allegedly indecent programming.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

ERRATUM TO PUBLIC NOTICE

PACIFIC BELL FILES WAIVER FOR REALLOCATION OF NONREGULATED POWER AND COMMON EQUIPMENT INVESTMENT

Released: March 11, 1994

On March 1, 1994, a Public Notice AAD 94-21 was released which requested comments on Pacific Bell's reallocation of its power and common investment associated with nonregulated activity in Account 2212, Digital Electronic Switching. The dates for comments and reply comments contained in the second paragraph of the Public Notice are incorrect. The correct dates are **March 28, 1994**, for filing comments and **April 12, 1994**, for filing reply comments.

For further information contact Ed Dashkin (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policy and Rules Concerning Rates for Dominate Carriers — AAD 92-47

New York Telephone Company and New England Telephone and Telegraph Company
Petition for Waiver
of Certain Reporting Requirements

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1994; Released: March 8, 1994

By the Chief, Accounting and Audits Division:

1. On October 12, 1993, the Bureau released its Memorandum Opinion and Order[1] in the above-captioned proceeding to establish in detail the service quality and infrastructure reporting requirements that the Commission had determined were necessary in initiating price cap regulation for local exchange carriers (LECs).[2] The *Service Quality Order* established filing dates for each of the reports required from price cap LECs. One of these reports, the Quarterly Service Quality Report (ARMIS Report 43-05) for the fourth quarter 1993, is due March 31, 1994. On November 12, 1993, New York Telephone Company and New England Telephone and Telegraph Company (together, NYNEX) filed a petition for waiver of some of the filing requirements for the March 31, 1994, infrastructure report covering calendar year 1993. In this Order we grant that petition.

2. NYNEX states that it currently does not track data to populate Table I - Installation & Repair Intervals (Interexchange Access) Line 114 - Average Interval and Table II - Installation & Repair Intervals (Local Service) Line 134 - Average Interval in the manner requested. Because the *Service Quality Order* was released on October 12, 1993 with data to be gathered for 4th Quarter 1993, NYNEX requests a limited waiver from filing lines 114 and 134 until the report period beginning January 1, 1994.

3. We find that NYNEX has narrowly defined its waiver request and has shown good cause why it should be granted. We therefore grant NYNEX's request.

4. Accordingly, IT IS ORDERED that the request for waiver filed on November 12, 1993 by New York Telephone Company and New England Telephone and Telegraph Company in the above captioned proceeding, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief
Accounting and Audits Division
Common Carrier Bureau

[1] Policy and Rules concerning Rates for Dominant Carriers, CC Docket No. 93-1138, Memorandum Opinion and Order, 8 FCC Rcd 7474 (Com. Car. Bur. 1993) (*Service Quality Order*).

[2] Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-266

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

ORDER

Adopted: February 8, 1994; Released: February 8, 1994

By the Commission: Commissioner Barrett issuing a separate statement.

I. INTRODUCTION

1. In this *Order*, on our own motion, we reconsider the expiration date of the freeze of regulated cable service revenues, and extend the expiration date of the freeze from February 15, 1994 until May 15, 1994.[1] Later this month, the Commission will consider pending petitions to reconsider various aspects of its rate regulations.[2] This short extension of the freeze is the minimum amount of time required to enable affected parties to familiarize themselves with any modifications to the cable rate regulations before the freeze is lifted.[3]

II. BACKGROUND

2. In the *Rate Order* issued in May 1993, we established a comprehensive regulatory framework providing for rate regulation of the basic service tier by local franchising authorities and of cable programming services tiers by the Commission as required under the Cable Act of 1992.[4] We established June 21, 1993 as the effective date of our new rate regulations.[5] At the same time, we were concerned that during the period between adoption of our rules and the earliest practical opportunity for local franchising authorities to establish regulation of the basic service tier, and for consumers to file complaints with the Commission concerning rates for cable programming services tiers, cable operators could raise rates, effectively undermining the statutory mandate that rates for cable services remain reasonable.[6] In particular, we were concerned that cable operators could raise rates to potentially unreasonable levels, as determined under the rate regulations ultimately adopted. We determined that a freeze of regulated cable service revenues until August 3, 1993 would provide a reasonable opportunity for local franchise authorities to become certified to regulate the basic service tier and for consumers to invoke by complaint the Commission's regulatory oversight over cable programming services tiers. Accordingly, we established a freeze until that date of revenues for cable services subject to regulation under the Cable Act of 1992.[7]

3. Subsequently, the Commission reexamined the feasibility of implementing rate regulation by June 21, 1993 in view of the significant additional responsibilities imposed on the Commission by the Cable Act of 1992 and a severe funding shortfall faced by the Commission at that time. We extended the freeze until November 15, 1993.[8] Our regulations establishing rate regulation of cable service became effective September 1, 1993.[9] However, those regulations were subject to reconsideration. Because the rate regulations were pending reconsideration, by early November, 1993, the Commission had received applications for certification from local franchising authorities representing less than 20 percent of communities that may regulate the basic service tier. Accordingly, on November 10, 1993, the Commission further extended the freeze on regulated revenues until February 15, 1994.[10]

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[1] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993) (*"Clarification Order"*), *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993) (*"Deferral Order"*), *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993)(*"Nov. 10 Extension Order"*).

[2] In considering the petitions for reconsideration and other issues outstanding in the rate regulation proceedings, the Commission will address, among other issues, the benchmark/price cap methodology, relief for small systems and so-called "going forward issues." The Commission also plans to adopt cost of service rules.

[3] *See* para. 5.

[4] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)("Cable Act of 1992"); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket 92-266, 8 FCC Rcd 5631, 58 FR 29736 (May 21, 1993)(*"Rate Order"*), *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, FCC 93-428 (released Aug. 27, 1993), 58 FR 46718 (September 2, 1993)(*"First Rate Reconsideration"*).

[5] *Rate Order*, 8 FCC Rcd at 5635.

[6] *See Rate Freeze Order*, 8 FCC Rcd at 2921; *Deferral Order*, at Bpara. 5.

[7] *Rate Freeze Order*, 8 FCC Rcd at 2921-22. *See also Clarification Order*, 8 FCC Rcd at 2918. Under the freeze, the average monthly subscriber bill for cable services and associated equipment subject to rate regulation under the Cable Act of 1992 may not increase above the level determined under rates in effect on April 5, 1993. The Commission provided for waivers of the rate freeze in particular cases where a cable operator can demonstrate that the freeze would impose severe economic hardship or threaten the viability of continued cable service. *Rate Freeze Order*, 8 FCC Rcd at 2921-22 n.6. *See, e.g.*, In the Matter of Fidelity Cablevision, Inc., Petition for Emergency Relief, *Order*, FCC 93-445 (released September 21, 1993).

[8] *Deferral Order*, FCC 93-304, 58 FR 33560 (June 18, 1993).

[9] *Id. See also* In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Order*, MM Docket No. 92-266, FCC 93-372, 58 FR 41042 (Aug. 2, 1993).

[10] *Nov. 10 Extension Order*, at paras. 4-5. We stated that, where local governments already have initiated rate regulation of the

III. DISCUSSION

4. As of January 31, 1994, the Commission had received 4,896 applications for certification from local franchising authorities covering approximately 7,534 communities served by cable. Although these figures for certifications are significant increases from the last time we extended the freeze, they still represent only a small percentage of the nearly 30,000 communities that are potentially eligible to regulate the basic service tier. We continue to believe that it is important to provide franchising authorities and other affected parties sufficient time to become familiar with any modifications to our rate regulations before the freeze is lifted. We expect to act on reconsideration by the end of this month, and we believe that it is important that the statutory goal of ensuring reasonable rates not be undermined in the interim.

5. The Administrative Procedure Act requires that new substantive rules be published in the Federal Register at least 30 days prior to their effective date.[11] In the event that we adopt any substantive changes to our rules on reconsideration, we anticipate that such revised rules would be released approximately 30 days after adoption and that these regulations would be published in the Federal Register within 15 days thereafter.[12] Thus, under this schedule, any new regulations adopted would become effective approximately 75 days after adoption. Extension of the freeze for that period of time is the minimum amount of time required to enable the Commission to adopt modified rules, should it choose to do so, and for such rules to become effective before the freeze is lifted.

6. We believe that this brief extension of the freeze will ensure that local regulators have been afforded a sufficient opportunity to file for certification and prepare for rate regulation under any modified rules that may be adopted. This extension should provide sufficient time for local regulators to become familiar with their rights and obligations under any such new regulations before cable operators are free to raise rates absent regulation. We emphasize that we will continue to provide cable operators the opportunity to file petitions for relief which demonstrate, in individual cases, that the freeze is causing severe economic hardship or threatens the viability of continued provision of cable service.[13] Throughout the duration of the rate freeze, we have received only five such petitions for relief. Thus, we conclude that only a small percentage of cable operators believe that the freeze has imposed hardship sufficient to compel them to seek relief from the freeze.

7. We also note that the Commission has acted expeditiously in addressing petitions for reconsideration of its rate regulation rules. In adopting rate regulations for the cable television industry, the Commission recognized that the rules would require further refinement based on survey data of the cable television industry to be gathered and analyzed by the Commission.[14] Shortly after the new rules became effective, the Commission conducted a survey to collect the data necessary to help it assess the rate regulations.[15] The Commission has analyzed this survey data and is now in a position to resolve the pending petitions for reconsideration by the end of this month.[16]

8. We find good cause under the Administrative Procedure Act to make this freeze effective with less than 30 days advance publication in the Federal Register.[17] As explained, an extension of the freeze from February 15, 1994 until May 15, 1994 is necessary to afford local franchising authorities a sufficient period in which to familiarize themselves with any revised regulations governing regulated cable service rates that the Commission may adopt on reconsideration later this month. We will make this *Order* and implementing rule changes effective upon publication in the Federal Register to prevent an expiration of the freeze that would otherwise occur with 30 days advance publication in the Federal Register. Such a result would seriously undermine the statutory goals of cable rate regulation and would be contrary to the public interest.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303(r), and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 543, that the freeze of cable service rates established in *Order*, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993), *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141, IS EXTENDED UNTIL May 15, 1994.

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basic tier, we were not concerned that rates for the tier could raise to unreasonable levels after November 15, 1993. We noted that in the initial freeze order, we determined that a freeze on rates for the cable programming services tier was necessary to prevent operators from evading the freeze by moving programming from the basic to the cable programming service tier. *Rate Freeze Order*, 8 FCC Rcd at 2933 n.10. We concluded in the *Nov. 10 Extension Order* that it was unnecessary to continue the freeze for cable programming service tiers where the basic tier has become subject to rate regulation. Accordingly, we amended the rule to make clear that the freeze would no longer apply to regulated cable services provided by cable operators whose basic cable service has become subject to rate regulation by a local franchising authority or the Commission. *Nov. 10 Extension Order*, at fn.12. As a result, the number of cable systems subject to the freeze decreases as franchising authorities become certified.

[11] *See* 5 U.S.C. § 553(d); *See also* 47 C.F.R. § 1.427.

[12] In addition, we will be adopting rules addressing issues raised in the *Third Notice of Proposed Rulemaking*. *See* In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428 (released Aug. 27, 1993), 58 FR 46737 (Sep. 2, 1993).

[13] *See Rate Freeze Order*, 8 FCC Rcd at 2921-22 n.6.

[14] *See, e.g., Rate Order*, 8 FCC Rcd at 5773; *Second Report and Order*, FCC 93-428 (released Aug. 27, 1993) at para. 130.

[15] *Order*, FCC 93-446 (released Sept. 17, 1993).

[16] In addition to analyzing the survey data during the period since adoption of the rate rules, the Commission has accommodated the requests of numerous cable operators, franchise authorities, programmers and many other interested parties, to meet with the Commission's new Chairman, who assumed office on November 29, 1993, for the purpose of expressing their views on the issues which the Commission will address on reconsideration of the rate rules. *See* News Release, Nov. 29, 1993, "Reed E. Hundt Sworn in as FCC Chairman."

[17] The Administrative Procedure Act generally requires publication in the Federal Register of substantive rules 30 days prior to their effective date but permits substantive rules to become effective with less than 30 days advance publication in the Federal Register for good cause. *See* 5 U.S.C. § 553(d)(1); *See also* 47 C.F.R. § 1.427(b).

10. IT IS FURTHER ORDERED, that Section 76.1090 of the Commission's rules, 47 C.F.R. Section 76.1090, IS AMENDED as set forth in the Appendix.

11. IT IS FURTHER ORDERED, that this *Order* IS EFFECTIVE upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 - CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552, as amended, 106 Stat. 1460.

2. Section 76.1090 is amended by revising paragraph (a) to read as follows:

§ 76.1090 Temporary Freeze of Cable Rates.

(a) The average monthly subscriber bill for services provided by cable operators subject to regulation under Section 623 of the Communications Act shall not increase above the average monthly subscriber bill determined under rates in effect on April 5, 1993, until May 15, 1994.

* * * * *

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation (Extension of Cable Rate Freeze)

In this Order, the Commission, on its own motion, reconsiders the expiration date of the freeze of regulated cable service revenues, and extends the expiration of the freeze from February 15, 1994 until May 15, 1994.[1] In doing so, the Commission's action will allow the minimum amount of time required for all affected parties to familiarize themselves with potential modifications to the cable rate regulations after the Commission completes its pending reconsideration of those rules.

Although I am supporting this action, I write separately because I believe it is necessary to reiterate a number of my concerns regarding the process of implementing the cable rate regulations, and the extent to which this action may address some of these issues. During this proceeding, I have consistently stated that the Commission must implement rate regulations in an orderly and effective manner in order to maintain the integrity of our regulatory process, to avoid creating potential unintended consequences, and to minimize false expectations among the consumer public.[2] I also have recognized that the Commission and its staff have made a concerted effort to implement rate regulation under very awkward procedural circumstances. In this regard, I have stated that the vast majority of implementation problems faced by the Commission regarding rate regulation were and continue to be a result of a premature effective

[1] See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993), extended, FCC 93-304, 58 FR 33560 (June 18, 1993), extended, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993).

[2] See Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993, 58 FR 41042 (Concurring in Part and Dissenting in Part Statement of Commissioner Andrew C. Barrett). See also First Order on Reconsideration in MM Docket No. 92-266, FCC 93-248, released August 27, 1993, 58 FR 46718 (Separate Statement of Commissioner Andrew C. Barrett); Testimony of Commissioner Andrew C. Barrett, Federal Communications Commission, Before the U.S. House of Representatives, Subcommittee on Telecommunications and Finance, (September 28, 1993).

date for those rules.[3] I remain concerned about the potential inequities for the industry, consumers, and franchising authorities that may result from the cable rate regulation proceeding, especially to the extent that the public's confusion may continue to increase. Indeed, I dissented from the prior Order that extended the freeze on cable revenues because of several issues related to the general level of administrative confusion, including my concerns that the decision: (1) would impose tremendous additional expense and administrative processing "nightmares" on franchise authorities and the FCC; (2) failed to address the disparity between the date on which operators were required to file responses to rate complaints and the date when a full complement of rate regulation rules would be in place; and (3) required cable operators and franchising authorities to commence critical rate regulation decisions while the existing rate rules were subject to change on reconsideration and without the benefit of cost-of-service rules.[4]

I remain concerned that the Commission already has created a fundamentally inequitable situation for cable operators by forcing critical business decisions based on benchmark standards that are subject to revision, and without either the cost-of-service principles or rules that the Commission ultimately will adopt. I believe, however, that today's decision to extend the freeze on cable revenues to May 15 reflects a substantially different set of considerations as compared to the November 10, 1993 Order. In particular, this action does not affect the filing date for responses by cable operators, and the burdens created by the November 10, 1993 Order have already occurred. This extension of the freeze also is intended to coincide with the effective date for the reconsideration of the rate regulation mechanism, including cost-of-service rules. Therefore, I will support the Commission's decision because I believe that this action, on its own, will not exacerbate the administrative confusion regarding cable rate regulation.

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[3] See Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993, 58 FR 41042 (Concurring in Part and Dissenting in Part Statement of Commissioner Andrew C. Barrett).

[4] See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266, Order ("November 10, 1993 Order"), released November 10, 1993, FCC 93-494, 58 FR 60141 (November 15, 1993) (Dissenting Statement of Commissioner Andrew C. Barrett).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 18, 1994

EFFECTIVE DATE OF RULES REGARDING CABLE SYSTEM CARRIAGE OF VERTICALLY INTEGRATED PROGRAMMING SERVICES

In the Commission's *Second Report and Order* in MM Docket 92-264, 8 FCC Rcd 8565 (1993) rules were adopted regarding the carriage by cable television systems of vertically integrated cable programming services. The necessary Office of Management and Budget forms clearance having now been obtained, the effective date for the rule amendments adopted has been established as January 26, 1994.

The Commission, adopted the *Second Report and Order* on September 23, 1993, and designated an effective date of January 10, 1994, predicated on the necessary forms clearance having been obtained by that date. The decision, in response to the Cable Television Consumer Protection and Competition Act of 1992 prescribed national subscriber limits (stayed in response to a judicial proceeding) and limits on the number of channels that can be occupied on a cable system by a video programmer in which the cable operator has an attributable interest. Included in this action was a revision to the rules which involved a recordkeeping obligation requiring approval by the Office of Management and Budget. That approval was received on January 26, 1994. Accordingly, the January 10, 1994, effective date for 47 CFR Section 76.504 (limits on carriage of vertically integrated programming) is revised to January 26, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Page Enterprises, Inc. File No. BRCT-930601KY

For Renewal of License of
Station KAME-TV
Reno, Nevada

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: February 24, 1994; Released: March 2, 1994

By the Commission: Commissioner Quello concurring in the result.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) a license renewal application for the captioned television station; (ii) a Petition to Deny timely filed on September 1, 1993, by the Arizona, Nevada and New Mexico State Conferences of the League of United Latin American Citizens (hereinafter LULAC) and a Petition to Deny timely filed on September 1, 1993, by the Las Vegas and Reno/Sparks Branches of the NAACP (hereinafter NAACP) against the above-captioned renewal application;[1] (iii) the licensee's combined opposition to the petitions; (iv) the licensee's responses to Commission inquiries; and (v) a Joint Request for Approval of Settlement Agreement filed by the NAACP, LULAC, the licensee of Station KAME-TV and Ellis Communications, Inc., proposed assignee of Station KAME-TV.

II. PLEADINGS

2. *Settlement Agreement.* On September 17, 1993, the NAACP, LULAC, the licensee of Station KAME-TV and Ellis Communications, Inc., proposed assignee of Station KAME-TV, filed a Joint Request for Approval of Settlement Agreement, which requests approval of the agreement, dismissal of the petition to deny, and grant of the station's license. We have reviewed the settlement agreement pursuant to 47 C.F.R. Section 73.3588 and *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process,* 4 FCC Rcd 4780 (1989) and find that the settlement agreement complies with the Commission's rules and policies. Therefore, we dismiss the petition.[2]

3. However, as is our practice in all cases, we reviewed the station's EEO program and performance pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Section 309. The results of our review are noted below.

III. DISCUSSION

4. *EEO RULE.* Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080(b) and (c).

5. When the renewal application indicates an absence of evidence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies and sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services,* 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters); *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC,* 854 F.2d 501 (D.C. Cir. 1988); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC,* 595 F.2d 621 (D.C. Cir 1978).

6. Review of the licensee's renewal application, combined opposition, and inquiry responses reveals that the stations had 52 full-time hiring opportunities, including 34 for upper-level positions, from June 1, 1990, to May 30, 1993.[3] In its renewal application, the licensee indicates contacting the following general sources and receiving the

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[1] The NAACP's Petition to Deny was directed at four other television stations in Nevada. LULAC's Petition to Deny was directed at 13 other television stations in Arizona, Nevada and New Mexico. Two of these renewal applications have already been acted on by the Commission. The remaining renewal applications will be addressed in separate orders.

[2] Due to the settlement agreement reached by the parties, the issue of standing is moot.

[3] The Reno, Nevada Metropolitan Statistical Area (MSA) is 15.7% minority (1.9% Black, 8.3% Hispanic, 3.9% Asian and 1.6% American Indian). In its pleadings, the licensee made corrections to its 1989 through 1992 Annual Employment Reports. Taking into account this updated information, in 1989, the station employed one American Indian on an overall staff of 27 (3.7%) and on an upper-level staff of 24 (4.2%). In 1990, the station employed one American Indian on an overall staff of 26 (3.8%) and on an upper-level staff of 21 (4.8%). In 1991, the station employed three minorities (one Black and two American Indians) on an overall staff of 27 (11.1%) and on an upper-level staff of 21 (14.3%). In 1992, the station employed three minorities (one Black and two American Indians) on an overall staff of 37 (8.1%) and on an upper-level staff of 32 (9.4%). In 1993,

cited number of minority referrals: the *Reno Gazette Journal* (8), Media Line (6), University of Nevada, Reno (2), Truckee Meadows Community College (2), Veterans Administration (0), State Industrial Insurance Systems (1) and American Rehabilitation Corporation (0). In its September 29, 1993, opposition, the licensee states that it has maintained a relatively small staff at the station and "has thus been relatively fettered in terms of attracting and retaining qualified minority personnel." The licensee failed to indicate, other than the referral source of the hiree,[4] the referral sources contacted for each position except to say that "[g]iven that the station commonly placed advertisements in the Reno Gazette Journal for the great majority of job openings it is assumed that most such applications derived from that source." In addition, with a few exceptions,[5] the licensee failed to indicate the number, race, and gender of applicants and interviewees for each position. The licensee asserted that it was not able to reconstruct this information with precision from the available records.[6] The licensee indicates that it hired eight minorities (three Hispanics, one Black, one Asian and three American Indians), including four (one Asian, one Black, and two Hispanics) for upper-level positions.

7. There are no substantial and material questions of fact warranting designation for hearing. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Moreover, there is no evidence that the licensee engaged in employment discrimination. Accordingly, grant of the station's renewal application is warranted.

8. However, the licensee's recruitment efforts were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (34) of its 52 full-time positions. Only ten of the 52 overall interview pools (19%) contained minorities. Only six of 34 upper-level interview pools (18%) contained minorities. Thus, minorities were absent from 81% of the overall pools and 82% of the upper-level pools. Notwithstanding the absence of minorities from the interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program. The licensee had virtually no applicant or interviewee data. In its pleadings, the licensee failed to indicate what sources, other than a general newspaper, it contacted when vacancies occurred. Accordingly, a base forfeiture of $12,500 is warranted. *See Policy Statement*, FCC 94-27 (Released: February 1, 1994).

9. In addition, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-level full-time positions renders its EEO efforts egregiously deficient warranting an upward adjustment of $6,250. Similarly, the combination of the above and its large number of hiring vacancies (52) warrants a further $6,250 upward adjustment, for a total forfeiture of $25,000. Given the number and types of deficiencies noted, a short term renewal is also warranted. *See Policy Statement, supra.*

10. However, we note that the licensee hired minorities during the period under review at a rate equal to 50% of the minority representation in the Reno, Nevada MSA for the period June 1, 1990, to May 30, 1993. Thus, a $6,250 downward adjustment in the forfeiture is appropriate. *See Policy Statement, supra.* Based on the foregoing, we will renew the licenses for a short term, impose reporting conditions, and issue a Notice of Apparent Liability for $18,750.[7]

IV. CONCLUSION

11. Upon review of the record, we find that grant of the renewal application is in the public interest. However, we will grant the renewal application for KAME-TV for less than a full term, ending October 1, 1996. To ensure that better efforts are taken with respect to its EEO program, we will impose reporting conditions on the licensee of KAME-TV. Further, by this *Order*, we will issue the station a Notice of Apparent Liability for $18,750.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the Joint Request For Approval of Settlement Agreement filed by the NAACP, LULAC, the licensee of KAME-TV and Ellis Communications, Inc. IS GRANTED.

13. IT IS FURTHER ORDERED that the license renewal application filed by Page Enterprises, Inc. for Station KAME-TV IS GRANTED FOR A SHORT TERM ending October 1, 1996, subject to reporting conditions as described herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $18,750.

14. IT IS FURTHER ORDERED that the licensee of KAME-TV submit to the Commission an original and one copy of the following information on June 1, 1994, June 1, 1995, and June 1, 1996:

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the station employed six minorities (one Black, one Hispanic, one Asian and three American Indians) on an overall staff of 38 (15.8%) and five minorities (one Black, one Hispanic, one Asian and two American Indians) on an upper-level staff of 32 (15.6%)

[4] The sources for the hirees included the Classifieds (49), the University of Nevada, Reno internship (3), the Veterans Administration (1) and sought out by station management (3).

[5] In its pleadings, the licensee asserts that in June 1992 it interviewed but did not hire two Blacks for a technical position. It states that one applicant responded to an ad in the local newspaper and the other was unsolicited. In November 1991, the licensee states that it interviewed but did not hire a Black for a sales position and did not know if there were any other applicants or interviewees for that position, which was filled by a white female. In August 1991, the licensee asserts that it sought out and hired a Black as Chief Engineer, a position for which there were no other applicants or interviewees. In April 1992, the licensee states that it sought out and hired an Hispanic as Local Sales Manager, a position for which the licensee advertised in the local newspaper, received no other interviewees and did not know if it received other applicants. Finally, in August 1992, the licensee indicates that it sought out and hired an Asian as an on-air anchor, a position for which no other individual applied or was interviewed.

[6] It states that it has adopted more precise recordkeeping procedures which will enable it to record such information in the future.

[7] In view of the pending assignment application for KAME-TV, we note that upon grant of that application, reporting conditions and short term renewal will follow the license as a matter of law and pass automatically to the assignee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

(a) For each report, please make two lists divided by full-time and part-time vacancies during the 12 months preceding the respective reporting dates, indicating the job title and FCC job category of the position, the race or national origin, sex and the referral source of each applicant for each and the race or national origin and sex of the person hired. The lists should also note which recruitment sources were contacted;[8]

(b) A list of employees as of the May 1, 1994 payroll period for the first report and as of the May 1, 1995, and May 1, 1996 payroll periods for the second and third reports by job title and FCC job category indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the stations' efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

15. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

16. The reports are to be filed with the Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch (202-632-7069). Regarding the forfeiture proceedings for KAME-TV, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to the ability to pay should include those financial letters set forth in the attached note.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[8] Such a list might start: (1) News Director; Officials and Managers;

Full-time

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP Selected: Black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates, Terms,
and Conditions for Expanded
Interconnection for Special Access

Pacific Bell Transmittal No. 1679
Revisions to Tariff F.C.C. No. 128

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1994; Released: March 2, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On January 21, 1994, Pacific Bell filed Transmittal No. 1679 to introduce virtual collocation for expanded interconnection service in one central office in San Francisco, California.[1] By this transmittal, Pacific Bell also seeks to revise the insurance and termination provisions of its expanded interconnection tariffs, and to clarify that the collocator will be charged for any additional taxes, charges, or assessments that are the result of that collocator ordering expanded interconnection service.[2] Transmittal 1679 is scheduled to take effect on March 7, 1994. No petitions were filed against this tariff.

2. This transmittal raises many of the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Special Access Expanded Interconnection Tariff Order*.[3] Accordingly, Transmittal 1679 will become effective following a one-day suspension and be subject to the investigation initiated in the *Special Access Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.[4]

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Pacific Bell's Revisions to its Tariff F.C.C. No. 128, Transmittal No. 1679, IS SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions reflecting the suspension no later than ten days from the release date of this Order.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Pacific Bell, Revisions to Tariff F.C.C. No. 128, Transmittal No. 1679, Description and Justification (D&J) at 1-1. The Common Carrier Bureau (Bureau) directed Pacific Bell to provide virtual collocation at this central office. Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, Expanded Interconnection with Local Telephone Company Facilities, Pacific Bell Request for Waiver of Section 64.1401(c)(1) of the Commission's Rules, CC Docket Nos. 93-162 and 91-141, 9 FCC Rcd 160 (Com. Car. Bur. 1993).

[2] Pacific Bell Transmittal No. 1679, D&J at 2-5.

[3] Ameritech Operating Companies, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Special Access Expanded Interconnection Tariff Order*).

[4] The Bureau has already designated issues in this investigation. *See* Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Rcd 6909 (Com. Car. Bur., 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-314
ET Docket No. 92-100

In the Matter of

Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services	RM-7617, RM-7760, RM-7782, RM-7860, RM-7977, RM-7978, RM-7979, RM-7980, PP-4, PP-36, PP-37, PP-79, and PP-80

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1994; Released: March 4, 1994

By the Commission: Commissioner Barrett issuing a statement.

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INTRODUCTION

1. By this action, the Commission reconsiders and clarifies the narrowband personal communication service (PCS) rules and pioneer's preference decisions adopted in the *First Report and Order* (*Report and Order*) in this proceeding.[1] Specifically, to promote better, more efficient and competitive service to the public, we are amending our rules to 1) provide a class of large regional service areas; 2) specify construction requirements based on geographic area or population served; and, 3) limit the number of response channels that an existing paging licensee may obtain.

2. We also are instructing the licensing bureau to condition any license awarded to Mobile Telecommunication Technologies, Inc. (Mtel) as a result of its pioneer's preference grant. Mtel will be required to use the design and technologies upon which its preference award is based. Mtel also will be required to hold its license for at least three years, or until the five-year construction benchmark is met, whichever occurs first. Finally, we are affirming denials of four pioneer's preference requests.

3. This completes our regulatory plan to authorize and facilitate provision of narrowband PCS to the American public. The rules and amendments we adopt herein will foster introduction of narrowband PCS services to the public, contribute to the development of the national information infrastructure, and provide Americans with ubiquitous wireless access to new data and voice services. In particular, establishing a category of larger regional service areas will lead to more rapid deployment of these services. This action will result in the creation of new jobs, increase productivity, and provide the basis for more effective U.S. competition in the global telecommunications market.

BACKGROUND

4. In the *Report and Order*, we allocated spectrum at 900 MHz for the narrowband PCS service and adopted rules to govern its operation.[2] Mtel was awarded a pioneer's preference for the development of an innovative new technology that will increase spectrum efficiency. Eighteen additional requests for pioneer's preference related to narrowband PCS were denied.

5. In response to the *Report and Order*, Mtel, PageMart, Inc. (PageMart), and Paging Network, Inc. (PageNet) filed petitions for clarification or reconsideration of six aspects of the rules: (1) size of service areas; (2) channel plan; (3) limits on holding multiple licenses; (4) eligibility for paging response channels; (5) construction requirements; and, (6) service definition.[3]

6. In addition, a number of issues related to pioneer's preferences are raised. Pacific Bell, PageMart and PageNet request clarification or reconsideration of aspects of the pioneer's preference grant to Mtel. While none of the petitioners challenge the technical merit of the award, all three request that Mtel be required to pay for its license. PageMart and PageNet also request that Mtel be required to build the system it proposed and that Mtel not be granted a license before other applicants. Additionally, PageMart requests that Mtel be granted a license for less than a nationwide service area. Finally, Advanced Cordless Technologies, Inc. (ACT), Echo Group L.P. (Echo), Free-

[1] Narrowband Personal Communications Services, *First Report and Order*, 8 FCC Rcd 7162 (1993).

[2] A total of three megahertz (the 901-902, 930-931 and 940-941 MHz bands) was allocated to the service, but only two of the three megahertz were channelized and made available for licensing.

[3] *See* Mtel, Petition for Clarification or Partial Reconsideration (September 10, 1993); PageMart, Petition for Reconsideration (September 10, 1993); and PageNet, Petition for Reconsideration and Clarification (September 10, 1993).

man Engineering Associates, Inc. (Freeman), and Global Enhanced Messaging Venture (Global) request reconsideration of the denial of their pioneer's preference requests.[4]

DISCUSSION

Size of Licensed Service Areas

7. In the *Report and Order*, we adopted licensed service areas and an associated spectrum/channel plan to accommodate the operation of competitive narrowband PCS services at the nationwide, regional and local levels. We adopted 51 regional service areas and 492 local service areas, based on Rand McNally's Major Trading Areas (MTAs) and Basic Trading Areas (BTAs), respectively.[5] We designated 11 channels for nationwide use, 13 channels for regional or MTA operations, and 2 channels for local or BTA use. We also set aside 8 unpaired acknowledgement or response channels for use by existing paging licensees and indicated that they would be licensed at the local BTA level. Further, we permitted regional and local service areas to be aggregated up to and including nationwide coverage.

8. In its petition, PageNet requests that we reconsider our decisions with regard to local and regional service areas. PageNet states that BTA service areas are technically unworkable; are not representative of existing local paging systems; and, do not cover sufficient population centers to be economically viable. It also argues that MTA service areas pose technical difficulties for regional advanced messaging services and are not representative of existing regional systems. PageNet also states that the Commission's decisions to allow aggregation of service areas and to assign licenses through auctions do not diminish the disadvantages of MTAs. PageNet states that the "vast majority" of existing paging systems are regional and wide area in nature, covering multiple cities and states. Accordingly, PageNet asks that we adopt local service areas that are at least the size of MTAs; and, that we adopt regional service areas based upon three to five, but no more than ten, large regions. PageNet further requests that we adopt service areas at least as large as MTAs for the paging response channels.

9. PageNet argues that BTAs are technically unworkable. It states that paging systems typically use high power base stations with service areas of 20 miles or more. PageNet indicates that many BTAs are less than 50 miles across, and therefore signals from a single base station located at the center would interfere with systems in neighboring BTAs. To avoid such interference, it states that licensees would be required to construct numerous low power base stations, thereby substantially increasing the costs of providing service. It argues that these higher costs will limit participation by small businesses. Similarly, PageNet states that use of MTAs for regional services is technically difficult because MTA borders, particularly those in the eastern third of the country, are often close to population centers and therefore difficult from a technical standpoint to cover with sufficient signal strength without interfering with the adjacent area's service provider.[6]

10. PageNet also argues that BTAs are not representative of existing local paging systems and that MTAs are not representative of regional paging systems.[7] It states that 900 MHz common carrier paging licensees overcome the existing small licensing areas by filing scores of applications simultaneously. Thus, PageNet argues that local service areas do not equate to BTAs but rather are, in practice, several times larger. PageNet further argues that BTAs are not economically viable because they do not sufficiently cover population centers. PageNet states that 297 of the 487 BTAs range from 26,000 to a quarter million people and thus are too small for an economically viable advanced paging system. PageNet asserts that, only the 52 BTAs with one million or more people, are "truly viable" from a financial standpoint. Similarly, it argues that MTAs are not representative of regional paging systems, and that using MTAs as the regional service area will deprive licensees of the economies of scale associated with larger regions.

11. Three parties filed comments in support of PageNet's reconsideration request. The Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. (APCP) expresses general support for larger regional and local service areas, but does not recommend specific service area sizes. PacTel Paging and PageMart concur with PageNet's assessment that MTAs are too small to support large regional paging systems. PacTel Paging states that the five region plan it proposed in its original comments would better approximate the scope of current regional paging systems.[8]

12. Both PageMart and PacTel Paging also support licensing larger local service areas and oppose the use of BTAs. PageMart agrees that local licenses based on BTAs

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[4] *See* Petitions for Reconsideration filed by ACT on November 22, 1993; Echo on September 10, 1993; Freeman on August 23, 1993; and Global on August 24, 1993.

[5] *See* Rand McNally, *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39 ("BTA/MTA Map"). Rand McNally organizes the 50 States and the District of Columbia into 47 MTAs and 487 BTAs. The BTA/MTA Map is available for public inspection at the Office of Engineering and Technology's Technical Information Center, Room 7317, 2025 M Street, N.W., Washington, D.C. For PCS licensing purposes, we adopted service areas that separated Alaska from the Seattle MTA and added five insular areas: Puerto Rico, U.S. Virgin Islands, Guam, Northern Mariana Islands, and American Samoa. In our rules, the insular areas are treated as five BTA service areas and three MTA service areas. *See* Section 99.102 of the attached revised rules. Additionally, the listing of counties, parishes and census divisions that comprise each BTA and MTA is also available for inspection at the Technical Information Center and was filed in GEN Docket No. 90-314 on February 15, 1994 by the Personal Communications Industry Association. (Note that this is a listing of Rand McNally's 47 MTAs and 487 BTAs. Thus the census divisions of Alaska are listed under the Seattle MTA, instead of separately in an Alaska MTA-like service area; and that the insular areas are not listed.)

[6] PageNet uses Springfield, Massachusetts, to illustrate the problem. Springfield is 3 miles from an MTA border. PageNet contends that a licensee serving Springfield would be limited to 5 watts and an antenna height of 50 feet. It also lists 43 cities that are near an MTA border, 42 of which are 10 miles or less from the border.

[7] For example, PageNet states that its local wide area Miami system covers portions of 4 BTAs, that its Los Angeles system covers portions of 5 BTAs, and that its San Francisco system covers portions of 6 BTAs.

[8] For example, PacTel Paging indicates that it now provides wide-area paging service that extends along virtually the entire

would not provide a population base large enough to justify constructing and operating an advanced paging system. PageMart states that license areas based on BTAs necessarily will result in either the inefficient, uneconomic use of numerous low power base stations or an inability to provide service to large portions of the licensed service areas. PageMart also requests that at least half of the paging response channels be designated for use at the MTA level, or preferably, at an even larger regional level. PacTel Paging argues that BTA areas are too small to present any competition to existing paging services or to the MTA licensees. It also states that BTAs do not represent a real opportunity for small, minority, or women-owned businesses because local licenses based on BTAs have economic value only if aggregated with adjoining areas. Additionally, PacTel Paging submits that if MTAs are considered to be too large for local licensing, an alternative is the 183 "economic areas" as defined by the Department of Commerce's Bureau of Economic Analysis (BEA). PacTel Paging states that BEA areas would be preferable to BTAs because BEAs encompass commuter areas surrounding each economic area.

13. In the *Report and Order*, we stated that there appears to be interest in providing narrowband PCS services across a range of local, regional and national licensed service area sizes. We found that large regional and nationwide service areas will provide economies of scale and further our goal of fostering the rapid implementation and deployment of narrowband PCS systems and services. Accordingly, we designated most narrowband PCS channels for MTA and nationwide use. Eleven channels were designated for nationwide use, 13 channels for regional/MTA use and 2 channels for local/BTA use. In adopting MTAs as the basis for regional service areas, we stated our belief that these areas represented a good compromise between the very large areas suggested by some parties and the smaller areas suggested by other parties. We noted that if applicants require service areas larger than those based on MTAs, nationwide licenses are available and aggregation of regional service areas is permitted.

14. We continue to believe that service areas based on MTAs contain sufficient population and geographic area to support economically viable narrowband PCS services.[9] Further, we anticipate that the rules we will adopt to govern the competitive bidding process will provide for and facilitate the aggregation of service areas. However, the parties have convinced us of the advantages of providing for an additional category of service area that is smaller than nationwide, but larger than individual MTAs. Therefore, we conclude that the creation of five large regions is in the public interest. These regions better reflect the technologies and business plans of the parties proposing to implement large regional narrowband PCS systems. We have reviewed the large regional service area proposals advocated by PageNet, PacTel Paging and Telocator earlier in this proceeding,[10] and have developed five large regional service areas that utilize MTA boundaries and have roughly equal population. Following MTA boundaries for the regions prevents overlap between these new large regional service areas and those based on MTAs and BTAs. This approach will allow greater economies of scale and facilitate the coordination and licensing of narrowband PCS services. We therefore are designating the following five regions for licensing of narrowband PCS:

Region 1 (Northeast): The Northeast Region consists of the following MTAs: Boston-Providence, Buffalo-Rochester, New York, Philadelphia, and Pittsburgh.

Region 2 (South): The South Region consists of the following MTAs: Atlanta, Charlotte-Greensboro-Greenville-Raleigh, Jacksonville, Knoxville, Louisville-Lexington-Evansville, Nashville, Miami-Fort Lauderdale, Richmond-Norfolk, Tampa-St. Petersburg-Orlando, and Washington-Baltimore; and, Puerto Rico and United States Virgin Islands.

Region 3 (Midwest): The Midwest Region consists of the following MTAs: Chicago, Cincinnati-Dayton, Cleveland, Columbus, Des Moines-Quad Cities, Detroit, Indianapolis, Milwaukee, Minneapolis-St. Paul, and Omaha.

Region 4 (Central): The Central Region consists of the following MTAs: Birmingham, Dallas-Fort Worth, Denver, El Paso-Albuquerque, Houston, Kansas City, Little Rock, Memphis-Jackson, New Orleans-Baton Rouge, Oklahoma City, San Antonio, St. Louis, Tulsa, and Wichita.

Region 5 (West): The West Region consists of the following MTAs: Honolulu, Los Angeles-San Diego, Phoenix, Portland, Salt Lake City, San Francisco-Oakland-San Jose, Seattle (including Alaska), and Spokane-Billings; and, American Samoa, Guam, and the Northern Mariana Islands.

15. We are also amending our narrowband PCS spectrum and channelization plan to include channels for the five large regions and MTAs, as follows:

Service Area		Channels Available
Nationwide	3-	50 kHz paired with 12.5 kHz
	5-	50 kHz paired with 50 kHz
	3-	50 kHz unpaired
Regions	4-	50 kHz paired with 12.5 kHz
	2-	50 kHz paired with 50 kHz
MTA	3-	50 kHz paired with 12.5 kHz
	2-	50 kHz paired with 50 kHz

West Coast and that a PCS licensee would have to aggregate dozens of MTAs to provide a comparable narrowband PCS service.

[9] We note that the populations of 48 of the MTAs range from just over one million to more than 26 million. The three MTAs below one million (Alaska (550,000), Guam and Northern Mariana Islands (176,000), and American Samoa (47,000)) are geographically separate from other population centers.

[10] *See* Comments to *Notice of Proposed Rule Making and Tentative Decision (Notice)* filed by PageNet at 9, note 7; PacTel Paging at Attachment I; and Telocator at Attachment I.

	2-	50 kHz unpaired
BTA	2-	50 kHz paired with 12.5 kHz

16. With regard to PageNet's and PageMart's requests for larger response channel service areas, we concur that some of the response channels should be set aside for licensing at the MTA level. We agree that designating some response channels at the MTA level will make it easier for operators of wider area local and regional systems to upgrade and coordinate their paging operations. We conclude that PageMart's request that half of the paging response channels be allocated on a MTA basis and half on a BTA basis balances the needs of those parties desiring to serve larger areas and those parties desiring to serve local areas. Accordingly, we are designating four of the eight response channels for licensing at the MTA level. The remaining four channels will continue to be available for licensing at the BTA level.

17. *Use of 50 kHz-Based Channels.* In the *Report and Order*, we adopted a 50 kHz-based channel plan (*i.e.*, channels were designated as follows: 50 kHz paired with 50 kHz, 50 kHz paired with 12.5 kHz, and 50 kHz unpaired channels). We found that most proposed narrowband services can be accommodated within such a 50 kHz channel plan. To accommodate applications that might need wider bandwidths, we permitted aggregation of up to three channels (*e.g.*, 150 kHz paired with 150 kHz).[11]

18. In its petition, PageMart requests reconsideration of the narrowband PCS channel plan, urging that we provide for an even greater variety in the size of channels. PageMart states that the channel plan adopted will limit the efficient use of this spectrum and encourage warehousing and speculation. It further argues that basing the channel plan on 50 kHz channels may inhibit the development of other services that require either smaller or larger configurations.[12] PageMart does not, however, propose a specific alternative to the channel plan we adopted. No party commented on this aspect of PageMart's petition.

19. In the *Report and Order*, after fully considering the proposals of PageMart and others on this issue, we concluded that the services proposed for these and other pairings would be accommodated best by adoption of a 50 kHz-based channel plan, with a provision to allow aggregation of channels. While PageMart expresses a general dissatisfaction with the channel plan, it fails to offer a specific alternative. Further, it fails to provide specific reasons or arguments why larger or smaller channels are needed or desirable. Nor does it explain how such channels would discourage warehousing or encourage more efficient use of the spectrum. PageMart does not provide a single concrete example of substantial incompatibility between our plan and systems proposed in the record. PageMart presents no new information or analysis that indicates a need for a wider range of channel sizes, either larger or smaller. Accordingly, we are maintaining a 50 kHz-based channel plan for narrowband PCS.

Limit on Holding Multiple Licenses

20. As noted above, our rules permit a single entity to hold licenses for up to three 50 kHz channels, paired or unpaired (*i.e.*, no more than 150 kHz paired with 150 kHz) in any geographic area. We stated that this approach would allow narrowband PCS providers flexibility to combine channels to accommodate specific service needs and would ensure that narrowband PCS is offered on a competitive basis.

21. PageMart, in its petition, requests reconsideration of this limit on holding multiple licenses. PageMart states that the restriction, coupled with the channel plan, may restrict the ability of operators to utilize spectrum in a "fully efficient manner." In addition, PageMart states that the *Report and Order* leaves unclear the total amount of spectrum for which a licensee is eligible. PageMart states that there are instances in which licensees may hold up to a total of 300 kHz, but that the limit of three licenses appears to restrict the total amount of capacity that can be held by some licensees to well below 300 kHz. PageMart argues that this "ambiguity" will result in warehousing and speculation because all applicants would apply for three paired 50 kHz channels, whether needed or not. Therefore, PageMart recommends that the Commission reduce the maximum amount of high-powered forward channels for which a licensee is eligible from 300 kHz to 150 kHz.

22. PageMart further states that the broad language in footnote 21 of the *Report and Order* referring to a limit based on the total spectrum in the licensee's nationwide, regional, and local licensed service area at any geographic point could be interpreted to mean that the cumulative amount of spectrum held by a licensee for all of its paging services (both existing and in the new narrowband PCS spectrum) is to be considered in (determining compliance with this limit. PageMart requests that we clarify this language to indicate that only narrowband PCS spectrum is included.

23. Finally, PageMart requests that the rules be amended with regard to two additional issues: 1) that eligibility for the paging response channels be limited to existing paging licensees, and 2) that the paging response channels be paired with and used to upgrade existing paging operations. Additionally, PageMart requests that each paging licensee be limited to two paging response channels in each service area because in the absence of a limit an existing paging operator could purchase more of these channels than legitimately needed to upgrade its system with the intent to prevent its competitors from obtaining channels to implement similar upgrades. No party addressed these requests.

24. Our intent is to limit entities to a total of three licenses for narrowband PCS spectrum, excluding the 12.5 kHz response channels reserved for the upgrade of existing systems. The multiple ownership limit does not include

[11] As indicated above, we also provided eight 12.5 kHz paging response channels for existing paging licensees.

[12] PageMart references its own Reply Comments to the *Notice* at 3-7, where it stated that the channel plan should have a range of variously sized channels from 25 kHz to 250 kHz. PageMart also cites PageNet's Comments to the *Notice* at 12, where PageNet stated that license grants should be for bandwidths ranging from 25 kHz to 250 kHz; and PacTel Paging's Comments to the *Notice* at 24, where PacTel Paging supported a channel plan offering channel sizes ranging from 25 to 100 kHz in multiples of 25 kHz.

existing paging spectrum. While the practical result of this limit is that the maximum amount of spectrum will range from 150 to 300 kHz, we disagree with PageMart that this result is inherently inefficient or that it will lead to warehousing. Given the statutory terms governing licensee selection by competitive bidding contained in the 1993 Omnibus Budget Reconciliation Act, we expect that this spectrum likely will be licensed through the competitive bidding process and that the cost for channels in any particular market will vary with the amount of spectrum. This spectrum-based cost, coupled with our construction requirements, provides a significant disincentive to warehouse spectrum. Further, given that different proposed systems require different amounts of spectrum to provide desired levels of service, providing a variety of channel bandwidths derived indirectly from the spectrum requirements of systems proposed on the record should provide an efficient means of meeting the spectrum requirements of the most applicants. Finally, we note that contrary to PageMart's understanding, our plan permits a single licensee to hold no more than 150 kHz in the high-power forward channels. Accordingly, we are maintaining the rules on holding multiple narrowband PCS licenses as adopted.

25. On our own motion, we are clarifying application of the narrowband PCS multiple ownership limits by adopting an attribution rule. For this purpose we adopt the five percent attribution limit adopted previously in the broadband PCS service proceeding.[13] Accordingly, narrowband PCS licensees are defined as entities having an ownership interest of five or more percent in a narrowband PCS license. Licensees may not have an attributable ownership interest in entities holding more than three narrowband PCS licenses in any geographic area. Entities that otherwise are qualified may own less than five percent of narrowband PCS licensees without restriction. As with broadband PCS, applied to narrowband PCS, this provision ensures that no individual person or single entity is able to exert undue market power through partial ownership in multiple narrowband PCS licensees in a single service area.

26. We agree with PageMart that the conditions for the use of the paging response channels require clarification. Therefore, we are now specifying that an "existing" paging licensee means a paging licensee authorized under Part 22 or Part 90 as of the adoption date of the *Report and Order*, June 24, 1993. In addition, the existing paging licensee must operate at least one base station in the MTA or BTA for which it requests a paging response channel. The paging response channels are limited to mobile-to-base transmissions and may be used only in a paired manner with existing paging channels to provide mobile-to-base station communications. Finally, we are persuaded that existing paging licensees should be limited to two paging response channels in any given geographic area, as suggested by PageMart. This will allow an opportunity for existing paging licensees to upgrade their operations to provide acknowledgement and messaging capability.

Construction Requirements

27. In the *Report and Order*, we adopted certain minimum requirements for operation and service to ensure that the spectrum is being effectively utilized. Specifically, we required narrowband PCS licensees to meet the following construction requirements. Licensees of nationwide service area channels must construct at least 250 base stations within five years and 500 base within ten years. MTA licensees must provide coverage to approximately 25 percent of the geographic area of their MTA within five years and 50 percent within ten years; or, alternatively, construct at least 25 base stations and 50 base stations within five and ten years, respectively. Licensees of BTA service area channels must construct at least one base station and begin providing service in their licensed service area within one year of being licensed. In evaluating compliance with the these requirements, we stated that we will consider that each base station serves a geographic area of about 3000 square kilometers (km2). In cases where low-power base stations that serve smaller areas are constructed, we stated that the licensee must aggregate the coverage areas of those lower power facilities to determine the number of equivalent (3000 km2 coverage area) base stations for the purpose of complying with the construction requirements.

28. Mtel, PageMart, and PageNet request clarification or reconsideration of certain aspects of the construction requirements. In its petition, MTel states that while the requirements attempt to ensure that the service benchmarks cannot be evaded by simply erecting the requisite number of inexpensive, low-power transmitters, the purposes of the rule would be better served by construction benchmarks that emphasize service to the public. Mtel states that relying solely on a geographic coverage requirement could lead to coverage in sparsely populated areas where service is not needed and economically unjustified. Mtel, therefore, suggests retaining the base station construction requirement but reorienting the emphasis of the rule to create benchmarks based on geographic area or population. Mtel recommends adopting coverage benchmarks of serving 37.5 percent of the population within five years and 75 percent within ten years for nationwide and regional licensees, and of serving 37.5 percent of the population within one year for BTA licensees.[14]

29. PageMart and PageNet, in their petitions, request clarification of the construction requirements particularly with regard to the treatment of low power base stations. PageMart requests that the Commission adopt a specific method for calculating the service area of low-power base stations and suggests the service radius contour formula used to calculate base station coverage in the cellular ser-

[13] *See* Broadband Personal Communications Services, *Second Report and Order*, 8 FCC Rcd 7700 at 7728, para. 61 and note 62 (1993).

[14] Mtel suggests that the rules be modified to include requirements on the number of base stations and the geographic area or population covered by such base stations. For example, Mtel suggests that the construction requirements for nationwide licensees be amended as follows:

> Licensees of nationwide service area channels must construct at least 250 base stations *providing a composite service area covering at least 750,000 square kilometers or 37.5 percent of the U.S. population* within five years *(Emphasis added)* ...

Mtel proposed similar language for each of the construction benchmark rules.

vice.[15] PageNet states that Commission needs to clarify what is meant by low power base stations so that a licensee can determine when it has satisfied its construction obligations.

30. American Paging, Inc. (American Paging) and PageMart support Mtel's proposal for alternative population-based coverage requirements. PageMart agrees with Mtel that utilizing only geographic criteria could lead to coverage in sparsely populated areas where service is not needed. However, PageMart cautions that the absolute minimum population benchmark for service by nationwide licensees should be no lower than 75 percent within ten years, and suggests that an even higher figure might be appropriate. American Paging agrees that Mtel's proposed benchmarks are realistic and substantial.

31. As stated in the *Report and Order*, we believe that narrowband PCS will be a highly competitive service and that licensees will have strong economic and competitive incentives to construct facilities to meet service demands. Nevertheless, we continue to believe that construction benchmarks are desirable. In this regard, we concur with Mtel's suggestion that the purposes of the rule would also be served by construction benchmarks that emphasize service to the public. We agree that the addition of alternative population-based coverage requirements would further the purposes of these construction requirements, including provision of universal access to PCS services. By including alternative population coverage requirements we can better ensure that narrowband PCS licensees provide new and better service to the public, that such service is implemented promptly, and that the spectrum is efficiently utilized. Accordingly, we are amending our rules as proposed by Mtel to require that the required base stations serve either a minimum geographic area or a minimum percentage of population at the five- and ten-year benchmarks.[16] In addition, we are amending the construction requirements to reflect the changes made in narrowband PCS service areas.

32. Nationwide narrowband PCS licensees will be required to construct base stations that provide coverage to a composite area of 750,000 square kilometers or serve 37.5 percent of the U.S. population within five years of initial license grant date; and, (to construct base stations that provide coverage to a composite area of 1,500,000 square kilometers or serve 75 percent of the U.S. population within ten years of initial license grant date. Regional narrowband PCS licensees will be required to construct base stations that provide coverage to a composite area of 150,000 square kilometers or serve 37.5 percent of the population of the service area within five years of initial license grant date; and, to construct base stations that provide coverage to a composite area of 300,000 square kilometers or serve 75 percent of the service area population within ten years of initial license grant date. MTA narrowband PCS licensees will be required to construct base stations that provide coverage to a composite area of 75,000 square kilometers or 25 percent of the geographic area, or serve 37.5 percent of the population of the service area within five years of initial license grant date; and, to construct base stations that provide coverage to a composite area of 150,000 square kilometers or 50 percent of the geographic area, or serve 75 percent of the population of the service area within ten years of initial license grant date. BTA narrowband PCS licensees must construct at least one base station and begin providing service in its BTA within one year of initial license grant date.

33. In demonstrating compliance with the construction and coverage requirements, we will allow licensees to individually determine an appropriate field strength for reliable service, taking into account the technologies employed in their system design and other relevant technical factors. Coverage of narrowband PCS base stations may be calculated by methods prescribed for 931 MHz common carrier paging,[17] or by using (industry-developed propagation models. The formula selected by the licensee should be based on the technical characteristics of its system. At the five and ten year benchmarks, nationwide, regional and MTA licensees will be required to file a map and other supporting documentation showing compliance with either the population or geographic area requirements. BTA licensees shall file a statement indicating commencement of service.

34. As indicated above, we believe that these requirements will foster our goal of providing the public with universal access to PCS services. We believe that the choice of geographic or population coverage strikes an appropriate balance between our goal of ensuring that PCS service is available in rural and remote areas and mere geographic coverage requirements that may lead to coverage where service is not needed and economically unjustified.[18] We intend to monitor closely the development of narrowband PCS services in this area; and, we will readdress, if necessary, our construction requirements at a later date to ensure that our goals for this service are met.

35. *Service Definition.* In the *Report and Order,* we considered and rejected restricting narrowband PCS service beyond two conditions: 1) fixed services are permitted only on an ancillary basis, and 2) broadcasting is not permitted. We defined PCS as a family of mobile and portable radio communications services which could provide services to individuals and business, and be integrated with a variety of competing networks. We found that narrowband PCS would be an important member of the PCS service family, and anticipated that advanced paging and messaging services would be one of the predominant narrowband services to be provided. We also stated that we did not wish to foreclose the development of other narrowband services.

36. In its petition, PageMart argues that while the Commission expects that advanced messaging and paging services will be one of the predominant narrowband PCS services to be provided, there are no safeguards to ensure that this expectation will be realized. Further, PageMart states that the scarcity of existing spectrum for traditional paging services, especially in major metropolitan areas, makes it likely that existing paging operators will seek to

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[15] *See* 47 C.F.R. § 22.903(a)(1).

[16] If the sale of a license is approved, the new licensee is held to the original build-out schedule.

[17] *See* 47 C.F.R. § 22.504(b) (1992).

[18] We have eliminated the requirement that licensees build a specific minimum number of base stations. We believe that these new geographic and population based coverage requirements eliminate the need to specify a specific number of stations. Further, this approach should also eliminate any previous ambiguity that may have occurred with our discussion of low power stations. All base stations, both high and low power, shall be counted based on their calculated service area in complying with the new cumulative geographic and population coverage requirements.

use this new spectrum for existing services, with the result that spectrum will not be available for innovative PCS uses. PageMart urges us to restrict narrowband PCS services to services that represent "a substantial advancement or improvement over paging services, and not merely a refinement or enhancement of existing services." No party addressed this aspect of PageMart's petition.

37. We continue to believe that a broad definition of PCS is warranted. We do not believe it would be desirable to limit the range of services and technologies that are allowed to use these frequencies. Rather, the broad definition we have adopted will allow the market to determine the mix of services and technologies that best meets the needs of the public for narrowband PCS services. We note that significant interest has been expressed in the record of this proceeding concerning the provision of a wide range of PCS services employing new technologies. We therefore do not expect that the narrowband PCS channels will be used to a significant extent for existing paging services. Accordingly, we are denying PageMart's the request that eligible narrowband PCS services be limited to "advanced" or "improved" services.

Mtel's Pioneer's Preference

38. Mtel (PP-37) was awarded a pioneer's preference for having developed and demonstrated the feasibility of significant innovations that will permit delivery of existing and new advanced paging and messaging services in a spectrum-efficient manner. As originally requested by Mtel, the award is for a nationwide license for a 50 kHz unpaired block.

39. Although none of the petitioners challenge the technical merit of the award,[19] PageMart, PageNet, and Pacific Bell request that Mtel be required to pay for its license; and PageMart and PageNet request that Mtel be required to build the system it proposed and not be granted a license before other applicants. Finally, PageMart requests that Mtel be granted a license for a service area smaller than nationwide.

40. *Payment for License.* Pacific Bell, PageMart, and PageNet agree that Mtel should be required to pay for the license it is expected to receive under its pioneer's preference grant.[20] The *Report and Order* granting the preference predated enactment of the statute authorizing competitive bidding authority that gives rise to this issue.[21] In view of these changed circumstances, Pacific Bell proposes that pioneer's preference licensees, and Mtel in particular, be required to pay a fee equal to the lowest winning bid paid in the competitive bidding process for a comparable spectrum block. Pacific Bell argues that not charging awardees will disadvantage competing providers. PageNet agrees, and argues that the pioneer's preference process was not designed to have an anti-competitive impact but that if Mtel does not have to pay a charge comparable to that of other licensees Mtel will be able to provide service at a cost lower than its competitors and thereby gain an unfair advantage over its competitors.

41. In its comments, American Paging also argues that Mtel should pay a just and reasonable amount for its license, arguing that at the time of Mtel's grant, the Commission could not have known how the Budget Reconciliation Act would define the circumstances in which competitive bidding would be mandated and that a "cost-free" license will have significant unforeseen anti-(competitive consequences. PageMart states that Mtel should pay full market value for its license and suggests that Mtel pay "at a minimum the average of the winning bids for comparable markets, perhaps with a demographic weighting formula or calculated on a "per-pop basis."

42. In its reply, PageMart states that Mtel should pay full market value for its license, arguing that the 1993 Budget Reconciliation Act is neutral on the entire pioneer's preference procedure and that the Conference Report makes clear that the issue of charging a preference awardee for its license has been left for the Commission to resolve. PageMart states that the Commission's regulations regarding the payment of licensing fees reflects an intent to limit charges for the processing of applications and other services, and cannot be interpreted as limiting the Commission's authority to collect a fee equivalent to a bid.

43. Mtel opposes the proposals, arguing that Congress previously mandated that license fees may not exceed the cost of regulation, and that in enacting the 1993 Budget Reconciliation Act Congress did not alter the fee requirements for licenses awarded to pioneer's preference holders. Therefore, Mtel concludes that charging a pioneer's preference grantee a fee for its license related to amounts bid at auction would be inconsistent with the rules under which the preference was awarded. Mtel also argues that it would be unlawful for the FCC to substantially modify the terms of its pioneer's preference grant in what it characterizes as a retroactive manner.

44. In the Pioneer's Preference Review proceeding we noted that Congress authorized use of competitive bidding methods only when multiple applications are filed that are mutually exclusive and that the pioneer's preference rules provide that a pioneer will be granted a license without being subject to competing applications.[22] The Commission stated that the statutory language may exempt a pioneer's preference grantee from paying for a license so issued, and solicited comment on this interpretation. The Commission further stated that disposition of the preference request by Mtel was made before enactment of auction authority and, as a matter of equity, nothing in this review will affect this

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[19] BellSouth Corporation and Freeman have appeals pending before the U.S. Court of Appeals for the D.C. Circuit that challenge the award to Mtel. *See BellSouth Corp. v. FCC*, No. 93-1518 (D.C. Cir. filed August 20, 1993) and *Freeman Engineering Associates, Inc. v. FCC*, No. 93-1519 (D.C. Cir. filed August 23, 1993).

[20] Pacific Bell and PageNet also request that the Commission consider the relationship between competitive bidding authority and the pioneer's preference rules. After Pacific Bell and PageNet filed their pleadings in this Docket we undertook such a review, *see* Review of the Pioneer's Preference Rules, *Notice of Proposed Rule Making*, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993).

[21] On August 10, 1993, Section 6002 of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, (1993 Budget Reconciliation Act) was enacted authorizing the Commission to employ competitive bidding to choose from among mutually exclusive applicants for licenses.

[22] *See* Pioneer's Preference Review *Notice of Proposed Rule Making, citing* Pub. L. No. 103-66, Section 6002(a), 8 FCC Rcd 7692 at 7693 (1993) (statute appears to preclude charging a fee where no mutually exclusive applications are submitted).

proceeding. After release of the Pioneer's Preference Review *Notice of Proposed Rule Making*, Pacific Bell stated that it agrees that any change in the pioneer's preference rules should not be applied to Mtel. However, Pacific Bell states that it continues to believe that in the future pioneer preference licensees should be required to pay a fee equal to the lowest winning bid for the appropriate licensing area.[23]

45. In the *First Report and Order* in ET Docket No. 93-266, we again declined to apply possible changes in our pioneer'sx0* ((preference rules to this proceeding.[24] We continue to believe that as a matter of equity we should not apply any new pioneer's preference rules in this proceeding, because a final order addressed the preference prior to enactment of the 1993 Budget Reconciliation Act. Accordingly, except for our normal established fees, we will not charge Mtel for the license that it may receive pursuant to its preference grant.[25]

46. *Requirement to Build Proposed System.* PageMart and PageNet request that Mtel be required to build the system it proposed and for which it received the award. Specifically, PageMart urges the Commission to require that Mtel use any license resulting from the pioneer's preference grant solely to develop the system it proposed, arguing that otherwise Mtel could use its preference to provide existing paging services or for an entirely different service that would not have qualified it for a preference. Similarly, PageNet requests that the Commission require Mtel -- or any preference licensee -- to provide the service for which it received the pioneer's preference. Mtel responds that it is unnecessary to condition its license with a requirement to build the system it proposed because it will file a license application to implement its NWN proposal upon which its preference is based.[26] PageMart responds that if Mtel is filing an application that is based on the technology for which it received a pioneer's preference, then Mtel should have no objection to such a requirement.[27]

47. In awarding three pioneer's preferences to 2 GHz broadband PCS applicants, we instructed the relevant licensing bureau to condition each license upon the licensee building a system that substantially uses the design and technologies upon which its preference award was based and further that the licensee hold the license for three years or until the five-year build-out requirement is met, whichever occurs first.[28] The Commission found that this requirement ensures the integrity of its pioneer's preference policies and is consistent with award of a dispositive pioneer's preference. We believe it inherent in our pioneer's preference policy that the innovator use the technology upon which its preference is based, and therefore will impose an identical requirement on Mtel. Accordingly, we will direct the licensing bureau to condition any license granted Mtel based on its preference upon Mtel building a system that substantially uses the design and technologies upon which its preference award is based. This condition will apply only for the nationwide channel for which the preference is being granted and only until it has met the initial five year build-out requirement in the rules.

48. Additionally, we instruct the licensing bureau to condition the license that Mtel may receive as a result of its pioneer's preference grant on holding the license for a minimum of three years or until the construction requirement applicable to the five-year build-out period has been satisfied, whichever occurs first. This condition is consistent with the Commission's policies established in the initial pioneer's preference rulemaking. There, the Commission prohibited transfer of a preference on the grounds that the Commission did not intend to create a "futures market" in preferences before substantial build-out has occurred; allowing licensees to transfer pioneer's preference license would be tantamount to allowing the transfer of the preference, and would subvert the purpose of the pioneer' preference policy to "help ensure that innovators have an opportunity to participate in new services that they take a lead in developing..."[29] As the Commission recognized in the initial rulemaking, however, there may be circumstances, such as the sale of the company itself, that would result in the transfer of the preference but would not thwart the Commission's policies.[30] We do not preclude requests for waiver on transfer of license under such circumstances.[31]

49. *Timing of Mtel's License.* PageNet requests that Mtel's license not be awarded before those of its competitors, arguing that consumers would have no alternative to Mtel's service offerings and that its competitors would not have a "level competitive playing field."[32] American Paging and PageMart 8support the request.[33] American Paging argues that all competitors should have the same opportunities in terms of market entry based upon simultaneous grant dates for initial licensing. PageMart argues that the pioneer's preference process was not intended to provide grantees with the advantage of receiving their licenses before those of their competitors, that licensing will be delayed until final competitive bidding rules are adopted, and that the

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[23] *See* Pacific Bell's Reply to Oppositions to Petition for Clarification at 3.

[24] *See* Review of the Pioneer's Preference Rules, *First Report and Order*, 9 FCC Rcd 605 at n.23 (1994).

[25] We do not address here the issue concerning our authority to charge pioneer's preference awardees in the future based upon comparable competitive bids or other methods.

[26] We have directed the Common Carrier Bureau to issue a public notice inviting Mtel to submit an application, *see Public Notice*, Mimeo No. 41645 (February 3, 1994). Because of concern over availability of these services in the greatest possible number of localities and communities, we directed the Bureau to consider conditioning any license granted Mtel as a result of its preference with a stricter build-out requirement, such as 90 percent at the 10-year mark. Mtel and other parties to the licensing proceeding will be provided an opportunity to comment on this possible condition in the context of the licensing process.

[27] BellSouth, in its judicial appeal, similarly stated that Mtel should be required to build the system it proposes.

[28] *See* Broadband Personal Communications Services, *Third Report and Order*, GEN Docket No. 90-314, FCC 93-550 at paras. 8-9 (released February 3, 1994).

[29] *See* Establishment of Procedures to Provide a Preference, *Report and Order*, 6 FCC Rcd 3488 (1991).

[30] *Id.* at 3496.

[31] In addition, to the extent Mtel objects to the these conditions, it may, once it receives a conditional grant, reject the grant, in which case its application will be designated for administrative hearing. *See* 47 C.F.R. § 1.110.

[32] *See* PageNet, Petition for Reconsideration and Clarification (September 10, 1993).

[33] *See* PageMart, Opposition and Comments on Petitions for Reconsideration and/or Clarification (October 25, 1993); American Paging, Comments (October 25, 1993).

Commission explicitly has rejected creating more than a *de facto* headstart for pioneer's preference grantees. PageMart states that Mtel already has received a *de facto* headstart because of the licensing certainty created by the preference grant. Therefore, PageMart urges that we issue all narrowband PCS licenses simultaneously and allow the market to determine the most attractive and efficient service.

50. Mtel responds that its license application should be processed expeditiously because the public interest would be disserved by denying consumers access to an innovative service.[34] Mtel argues that the purpose of the Commission's pioneer's preference policy is to encourage the development of technical innovations to provide new consumer services and that delaying Mtel's license is inconsistent with encouraging the rapid introduction and use of such new technologies. Further, Mtel argues that the Commission understood that winners of pioneer's preferences may receive a *de facto* headstart due to the time it may take other entities to apply for and be licensed. Finally, Mtel notes that the Commission is required by the 1993 Budget Reconciliation Act to begin licensing PCS on or before May, 1994, and therefore argues that granting Mtel a license as soon as it has satisfied all relevant requirements would not significantly disadvantage potential competitors.

51. We disagree that Mtel is receiving more than a *de facto* headstart. As soon as the competitive bidding procedures are in place, we expect to begin licensing the remaining channels in this service. In the Pioneer's Preference *Report and Order*, we stated that pioneer's preference grantees may receive a *de facto* headstart because of the nature of our licensing process, but we declined to establish of a defined period during which the pioneer would be guaranteed a monopoly.[35] The parties have advanced no argument that convinces us to treat Mtel differently than other pioneer's preference awardees. Therefore, Mtel's license application will be processed without delay as soon as administratively feasible.

52. *Service Area.* In the *Report and Order*, we provided eleven channels (five 50/50 kHz, three 50/12.5 kHz, and three 50 kHz unpaired channels) for nationwide competitive narrowband services and granted Mtel a pioneer's preference for one of the 50 kHz unpaired channels. PageMart suggests that Mtel's pioneer's preference be limited to the principal market in which it tested its system. PageMart argues that a nationwide license is inconsistent with the level of investment Mtel made in developing the systems for which its preference was granted. PageMart also argues that the advent of competitive bidding undermines much of the need to provide innovators with special preferences and that a license limited to the geographic area in which Mtel conducted its testing would accomplish the aims of the preference system without providing unnecessary, anti-competitive advantages. No other party commented on this issue.

53. Mtel opposes PageMart's request, arguing that its proposed service, like the one for which PageMart requested a pioneer's preference, is inherently nationwide. Mtel also states that nationwide coverage is a fundamental benefit offered by its Nationwide Wireless Network (NWN) to consumers and that NWN responds to documented consumer demand for such a nationwide service.

54. In the *Report and Order* we granted Mtel a license for the service area it requested. There are ten other nationwide licenses available, including two additional 50 kHz unpaired channels. In the *Report and Order*[36] we concluded that, given the provision for 11 channels on a nationwide basis, a nationwide preference is consistent with promoting a competitive market for narrowband services. We noted that Mtel has experience in providing nationwide paging services, has designed its proposed system to be deployed nationwide, and provided evidence that there is a market for its services. We continue to believe that grant of a nationwide preference to Mtel is fully justified by the record of its accomplishments and consistent with our rules and underlying goal of promoting competition. Accordingly, we affirm Mtel's pioneer's preference grant for a nationwide 50 kHz unpaired channel.

Pioneer's Preference Denials

55. *ACT (PP-4).* ACT proposes a second generation cordless telephone (CT-2) type service in the 940-948 MHz band. In the *Tentative Decision* in GEN Docket No. 90-314, we tentatively denied ACT's preference request because CT-2 type systems are not innovative.[37] ACT did not file comments on the *Tentative Decision*. In the *Report and Order*, we noted that CT-2 type service already had been developed and implemented by others in various parts of the world, and stated that the introduction of an existing service does not meet the criteria of our pioneer's preference rules. ACT's preference request therefore was denied.

56. ACT petitioned for reconsideration of the denial of its preference request 73 days after the deadline for filing such a petition. Because the 30-day deadline for filing petitions for reconsideration is statutory, *see* 47 U.S.C. § 405, we dismiss ACT's petition as untimely filed.

57. *Echo (PP-36).* Echo proposes a two-way Mobile Data Radio Service ("MDRS") and requests a 25 kHz pair in the 930-931 MHz band.[38] In the *Report and Order*, we denied Echo's preference request, stating that Echo developed MDRS on land mobile and cellular frequencies, and that the services Echo proposed already are permitted in these bands; that Echo did not demonstrate its responsibility for developing a specific innovation that permits provision of MDRS on narrowband PCS frequencies; and that Echo did not demonstrate the innovativeness of its technology.

58. Echo argues that the denial is inconsistent with the rules and the facts presented. Echo claims that in comparison to Mtel, its system is more cost-effective, uses less spectrum than required by Mtel's system, and provides significantly greater capacity than Mtel. Echo adds that its system is a two-way, real-time system while Mtel uses a store-and-forward technology. No party commented on Echo's petition.

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[34] *See* Mtel, Opposition to Petitions for Reconsideration of PageNet and Pacific Bell (October 25, 1993).

[35] *See Report and Order*, GEN Docket No. 90-217, 6 FCC Rcd 3488 at 3492 (1991).

[36] *Report and Order* at note 63.

[37] *See Tentative Decision and Memorandum Opinion and Order*, 7 FCC Rcd 7794 (1992).

[38] Echo proposes that the 25 kHz pair be divided into five 5 kHz packet data channels for base station transmissions and five 5 kHz packet data channels for mobile transmissions.

59. The record demonstrates that MDRS was developed and initially designed for implementation in services in which its use already is authorized. Echo has not demonstrated how MDRS differs from existing or proposed two-way data services on cellular frequencies or the two-way mobile data services that exist on other 800 and 900 MHz frequencies. Nor has Echo has demonstrated with specificity the developments for which it is responsible that permits MDRS to be used on narrowband PCS frequencies. Additionally, while Echo contends that its system is economical, how it derives its cost figures is unexplained in the record. Accordingly, we deny Echo's petition for reconsideration.[39]

60. *Freeman (PP-79).* Freeman proposes an Enhanced Paging Service ("EPS"), which is a wide band paging service that Freeman states would allow the integration of tone plus voice, tone only, digital readout, and alphanumeric paging and "E-Mail" paging services on a single paging channel. Freeman originally requested 262 kHz per licensee: 150 kHz for base stations to simulcast over a large geographic area, 56 kHz for mobiles and fixed units to respond to an incoming call, and 56 kHz for base stations and mobiles for packet messaging to be used in conjunction with the paging system for wireless input of paging calls.

61. In the *Report and Order,* the Commission denied the preference request because Freeman's proposal requires an amount of spectrum inconsistent with the rules adopted and because Freeman appeared to propose to use 150 baud simulcast equipment, which is slow and not spectrum efficient or innovative.

62. Freeman argues that the reasons for denying its request aremisplaced. Specifically, Freeman argues that it has revised its system to require a high-power bandwidth of 150 kHz paired with a low-power bandwidth of 50 kHz, and therefore that its request for spectrum now is consistent with the rules adopted because the rules permit aggregation of licenses up to 150 kHz in the high-powered bands paired with 150 kHz in the low-powered bands. Additionally, Freeman states that its proposed system would not employ 150 baud simulcast equipment, and that the maximum speed of its system would be 288 kilobits per second (kbps) in the 150 kHz forward channel, which Freeman states is equivalent to 96 kbps in a 50 kHz channel. Freeman uses this equivalent speed to compare its system to Mtel's system that uses 24 kbps in a 50 kHz channel. No party commented on Freeman's petition.

63. We find that Freeman's revised system remains incompatible with our 900 MHz PCS licensing rules. Freeman's request for 150 kHz paired with 50 kHz exceeds the largest channel -- 50 kHz paired with 50 kHz -- that is available for assignment as a single license. To license a 150/50 kHz system, we necessarily would have to license non-contiguous channels, *i.e.,* one 50/50 channel and two 50 kHz unpaired channels; however, Freeman has not shown that its system can work with non-contiguous channels. Furthermore, our pioneer's preference rules provide for grant of one license, which under our adopted channel plan would be for 50 kHz paired with 50 kHz. This would not provide Freeman with the spectrum it appears required. Accordingly, we deny Freeman's petition for reconsideration.

64. *Global (PP-80).* Global proposes an enhanced narrowband data and paging service called Global Enhanced Messaging ("GEM") that it describes as transmitting messages at 6.25 kbps rates in a 25 kHz channel. Global requests one 25 kHz unpaired channel. Global states that the GEM service would utilize a unique radio paging transmission format that would support a data transmission speed in excess of 6.25 kbps and that this speed improvement would be enhanced further through techniques that reduce the amount of information transmitted to send certain types of paging data. Specifically, Global states that these techniques would increase the number of alphanumeric subscribers accommodated on a 25 kHz channel by 30 percent over the number achievable by merely increasing the speed. Finally, Global states that the GEM system would use a device that integrates a pager with a portable data terminal, which can be connected to the telephone network to permit two-way communications.

65. In the *Report and Order,* the Commission denied Global's preference request, stating that a device made to connect with the telephone network to receive large messages and acknowledge pages does not qualify as innovative; that GEM's increase in transmission speed lacks innovativeness; that the Commission was unable to determine the technical feasibility of GEM's claimed improvement over error control and interleaving because Global did not submit the technical details of its claim for the public record; and that the technologies that the Commission was able to identify in Global's proposal all are currently available. Therefore the Commission concluded that Global had failed to demonstrate the innovativeness of its proposal.

66. In its Petition for Reconsideration, Global argues that Mtel's request received unequal treatment; that Global's "Pagentry" device has been approved for a patent; that the Commission appears in part to base its decision to award pioneer's preferences on the policies underlying the patent laws and that it ignored this in the decision; that the Commission overlooked the importance of the device used by the end user in a communications system; and that the Commission failed to consider properly the efficiencies of Global's proprietary protocol and character transmission system. Global argues that it submitted substantial information demonstrating the feasibility of its proposal and offered to submit additional proprietary information if the Commission would maintain its confidentiality. Therefore, Global argues that the Commission failed to properly evaluate the documentation submitted and made its decision without requesting the patent application material. No party commented on Global's petition.

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[39] In the 2 GHz PCS proceeding we denied the pioneer's preference request of Qualcomm, Incorporated for similar reasons, stating that most of the technical developments and patents associated with Qualcomm's proposal appear to have been developed for implementation of its 800 MHz digital cellular system and that Qualcomm had not demonstrated with specificity its responsibility for any innovative developments in adapting these developments to the 2 GHz PCS band. While Qualcomm had done work at 2 GHz on exclusion zones around microwave towers, the use of smaller cells, and remote antennas, after extensive review we were unable to identify a specific significant aspect of this work that is innovative and for which Qualcomm was responsible. Therefore, while Qualcomm's equipment appeared to be viable for the provision of PCS services, we concluded that Qualcomm did not merit a preference. *See Third Report and Order, supra* note 28, at para. 266.

67. We disagree that Mtel's request received unequal treatment. In the *Report and Order*, we stated that Mtel's development of technology permitting attainment of 24 kbps data rates for a nationwide simulcast paging and messaging integrated service is a significant communications innovation. We went on to state that Mtel has demonstrated that its proposed NWN is innovative, spectrum efficient, and technically feasible.[40] We also do not agree that a device that uses existing technologies to connect to the public switched telephone network (PSTN) qualifies as innovative under our rules. Third, our pioneer's preference policy is not based on the policies underlying the patent laws. In the Pioneer's Preference *Report and Order*, we explicitly stated that while portions of a broad-based radio service may be patentable, including both equipment and specific services the entire broad-based radio service would not be patentable.[41] We recognized that patentability is not necessarily probative of whether a pioneer's preference request should be granted. Global determined not to submit material it deemed proprietary, and we do not find, based on Global's submissions, that Global has demonstrated that its system is innovative. Accordingly, we deny Global's petition for reconsideration.

CONCLUSION

68. With the adoption of this *Memorandum Opinion and Order*, we finalized the spectrum allocation, service rules, and pioneer's preference decisions for the narrowband PCS service. Also, today we have adopted a *Second Report and Order* in GN Docket No. 93-252, which, *inter alia*, implements Section 332 of the Communications Act as it affects the licensing of PCS.[42] Adoption shortly of a report and order prescribing regulations to implement Section 309(j) of the Communications Act pertaining to competitive bidding will complete the regulatory framework for this new narrowband PCS service.

ORDERING CLAUSES

69. Accordingly, IT IS ORDERED that Part 99 of the Commission's Rules IS AMENDED as specified in the Appendix, effective 30 days after publication in the Federal Register.

70. IT IS FURTHER ORDERED THAT the petitions for clarification or reconsideration filed by Mobile Telecommunication Technologies, Inc., Paging Network, Inc., and PageMart, Inc. ARE GRANTED IN PART as discussed *supra* and ARE DENIED in all other respects.

71. IT IS FURTHER ORDERED THAT the petitions for reconsideration filed by Echo Group L.P., Freeman Engineering Associates, Inc., and Global Enhanced Messaging Venture ARE DENIED and that the petition for reconsideration filed by Advanced Cordless Technologies, Inc. IS DISMISSED.

72. IT IS FURTHER ORDERED That the licensing bureau shall impose the following conditions on the license received by Mobile Telecommunication Technologies, Inc. (Mtel) pursuant to its pioneer's preference award: 1) Mtel shall be required to build a system that substantially uses the design and technologies upon which its preference award was based; and 2) Mtel must hold its license for three years or until the construction requirements applicable to the five-year build-out period specified in Section 99.103 of the Commission's Rules have been satisfied, whichever occurs first. IT IS FURTHER ORDERED THAT the petitions filed by Pacific Bell, Paging Network, Inc., and PageMart, Inc. addressing Mtel's pioneer's preference award ARE GRANTED to this extent and, in all other respects, ARE DENIED.

73. This action is taken pursuant to Sections 4(i), 7(a), 302, (303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix: Revised Rules

Part 99 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 99 -- PERSONAL COMMUNICATIONS SERVICES

1. The authority citation in Part 99 is amended to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. Sections 154, 301, 302, 303, and 332, unless otherwise noted.

2. The table of contents for Part 99 is amended by removing Section 99.13, adding Sections 99.101 and 99.129, and revising Sections 99.102 and 99.130 as follows:

* * * * *
99.13 [DELETED]
* * * * *
99.101 Multiple ownership restrictions.
99.102 Service areas.
* * * * *
99.129 Frequencies.
99.130 Paging response channels.
* * * * *

3. Section 99.13 is removed.
4. Section 99.101 is added to read as follow:

§ 99.101 Multiple ownership restrictions.

[40] *See Report and Order*, 8 FCC Rcd 7162 at 7172-7175 (1993).
[41] *See Report and Order*, 6 FCC Rcd 3488 at 3490 (1991).
[42] *See Second Report and Order*, GN Docket No. 93-252, FCC 94-31, adopted February 3, 1994.

Narrowband PCS licensees shall not have an ownership interest in more than three of the 26 channels listed in Section 99.129 in any geographic area. For the purpose of this restriction, a narrowband PCS licensee is any person or entity with an ownership interest of five or more percent in an entity holding a narrowband PCS license.

5. Section 99.102 is revised to read as follows:

§ 99.102 Service areas.

Narrowband PCS service areas are nationwide, regional, Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) as defined below. MTAs and BTAs are based on the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39 ("BTA/MTA Map"). Rand McNally organizes the 50 States and the District of Columbia into 47 MTAs and 487 BTAs. The BTA/MTA Map is available for public inspection at the Office of Engineering and Technology's Technical Information Center, Room 7317, 2025 M Street, N.W., Washington, D.C.

(a) The nationwide service area consists of the fifty states, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and United States Virgin Islands.

(b) The regional service areas are defined as follows:

(1) Region 1 (Northeast): The Northeast Region consists of the following MTAs: Boston-Providence, Buffalo-Rochester, New York, Philadelphia, and Pittsburgh.

(2) Region 2 (South): The South Region consists of the following MTAs: Atlanta, Charlotte-Greensboro-Greenville-Raleigh, Jacksonville, Knoxville, Louisville-Lexington-Evansville, Nashville, Miami-Fort Lauderdale, Richmond-Norfolk, Tampa-St. Petersburg-Orlando, and Washington-Baltimore; and, Puerto Rico and United States Virgin Islands.

(3) Region 3 (Midwest): The Midwest Region consists of the following MTAs: Chicago, Cincinnati-Dayton, Cleveland, Columbus, Des Moines-Quad Cities, Detroit, Indianapolis, Milwaukee, Minneapolis-St. Paul, and Omaha.

(4) Region 4 (Central): The Central Region consists of the following MTAs: Birmingham, Dallas-Fort Worth, Denver, El Paso-Albuquerque, Houston, Kansas City, Little Rock, Memphis-Jackson, New Orleans-Baton Rouge, Oklahoma City, San Antonio, St. Louis, Tulsa, and Wichita.

(5) Region 5 (West): The West Region consists of the following MTAs: Honolulu, Los Angeles-San Diego, Phoenix, Portland, Salt Lake City, San Francisco-Oakland-San Jose, Seattle (including Alaska), and Spokane-Billings; and, American Samoa, Guam, and the Northern Mariana Islands.

(c) The MTA service areas are based on the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39, with the following exceptions and additions:

(1) Alaska is separated from the Seattle MTA and is licensed separately.

(2) Guam and the Northern Mariana Islands are licensed as a single MTA-like area.

(3) Puerto Rico and the United States Virgin Islands are licensed as a single MTA-like area.

(4) American Samoa is licensed as a single MTA-like area.

(d) The BTA service areas are based on the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39, with the following additions: American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands are licensed separately as BTA-like areas.

6. Section 99.103 is revised to read as follows:

§ 99.103 Construction requirements.

(a) Nationwide narrowband PCS licensees shall construct base stations that provide coverage to a composite area of 750,000 square kilometers or serve 37.5 percent of the U.S. population within five years of initial license grant date; and, shall construct base stations that provide coverage to a composite area of 1,500,000 square kilometers or serve 75 percent of the U.S. population within ten years of initial license grant date.

(b) Regional narrowband PCS licensees shall construct base stations that provide coverage to a composite area of 150,000 square kilometers or serve 37.5 percent of the population of the service area within five years of initial license grant date; and, shall construct base stations that provide coverage to a composite area of 300,000 square kilometers or serve 75 percent of the service area population within ten years of initial license grant date.

(c) MTA narrowband PCS licensees shall construct base stations that provide coverage to a composite area of 75,000 square kilometers or 25 percent of the geographic area, or serve 37.5 percent of the population of the service area within five years of initial license grant date; and, shall construct base stations that provide coverage to a composite area of 150,000 square kilometers or 50 percent of the geographic area, or serve 75 percent of the population of the service area within ten years of initial license grant date.

(d) BTA narrowband PCS licensees shall construct at least one base station and begin providing service in its BTA within one year of initial license grant date.

(e) In demonstrating compliance with the above construction requirements, licensees must base their calculations on signal field strengths that ensure reliable service for the technology utilized.

(1) For the purpose of this section, the service radius of a base station may be calculated using the following formula:

$$d_{km} = 2.53 \times h_m^{0.34} \times p^{0.17}$$

where d_{km} is the radial distance in kilometers, h_m is the antenna HAAT of the base station in meters, and p is the e.r.p. of the base station in watts.

(2) Alternatively, licensees may use any service radius contour formula developed or generally used by industry, provided that such formula is based on the technical characteristics of their system.

(f) Upon meeting the five and ten year benchmarks in paragraphs (a), (b) and (c) of this section, licensees shall file a map and other supporting documentation that demonstrates compliance with the geographic area or population coverage requirement. BTA licensees shall file a statement indicating commencement of service. The filing must be received at the Commission on or before expiration of the relevant period.

(g) If the sale of a license is approved, the new licensee is held to the original build-out requirement.

(h) Failure by a licensee to meet the above construction requirements shall result in forfeiture of the license and ineligibility to regain it.

NOTE: Population-based construction requirements contained in this section shall be based on the 1990 census.

7. Section 99.129 is added to read as follows:

§ 99.129 Frequencies.

The following frequencies are available for narrowband PCS.

(a) Eleven frequencies are available for assignment on a nationwide basis as follows:

(1) Five 50 kHz channels paired with 50 kHz channels:

Channel 1: 940.00-940.05 and 901.00-901.05 MHz;
Channel 2: 940.05-940.10 and 901.05-901.10 MHz;
Channel 3: 940.10-940.15 and 901.10-901.15 MHz;
Channel 4: 940.15-940.20 and 901.15-901.20 MHz; and,
Channel 5: 940.20-940.25 and 901.20-901.25 MHz.

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 6: 930.40-930.45 and 901.7500-901.7625 MHz;
Channel 7: 930.45-930.50 and 901.7625-901.7750 MHz; and,
Channel 8: 903.50-930.55 and 901.7750-901.7875 MHz;

(3) Three 50 kHz unpaired channels:
Channel 9: 940.75-940.80 MHz;
Channel 10: 940.80-940.85 MHz; and,
Channel 11: 940.85-940.90 MHz.

(b) Six frequencies are available for assignment on a regional basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 12: 940.25-940.30 and 901.25-901.30 MHz; and,
Channel 13: 940.30-940.35 and 901.30-901.35 MHz.

(2) Four 50 kHz channels paired with 12.5 kHz channels:

Channel 14: 930.55-930.60 and 901.7875-901.8000 MHz;
Channel 15: 930.60-930.65 and 901.8000-901.8125 MHz;
Channel 16: 930.65-930.70 and 901.8125-901.8250 MHz; and,
Channel 17: 930.70-930.75 and 901.8250-901.8375 MHz.

(c) Seven frequencies are available for assignment on a MTA basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 18: 940.35-940.40 and 901.35-901.40 MHz; and,
Channel 19: 940.40-940.45 and 901.40-901.45 MHz.

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 20: 930.75-930.80 and 901.8375-901.8500 MHz;
Channel 21: 930.80-930.85 and 901.8500-901.8625 MHz; and,
Channel 22: 930.85-930.90 and 901.8625-901.8750 MHz.

(3) Two 50 kHz unpaired channels:

Channel 23: 940.90-940.95 MHz; and,
Channel 24: 940.95-941.00 MHz.

(d) Two 50 kHz channels paired with 12.5 kHz channels are available for assignment on a BTA basis:

Channel 25: 930.90-930.95 and 901.8750-901.8875 MHz; and,
Channel 26: 930.95-931.00 and 901.8875-901.9000 MHz.

8. Section 99.130 is revised to read as follows:

§ 99.130 Paging response channels.

(a) The channels listed in paragraphs (b) and (c) of this section are available to paging licensees licensed pursuant to Parts 22 and 90 of this chapter as of June 24, 1993, and which operate at least one base station within the service area for which the licensee requests such a channel. These channels shall be used only in paired communications with existing paging channels to provide mobile-to-base station communications. Eligible paging licensees may hold licenses for a maximum of two of these channels within the same geographic area. These licenses are not counted toward the multiple ownership restrictions of section 99.101.

(b) The following four 12.5 kHz unpaired channels are available for assignment on a MTA basis:

901.9000-901.9125 MHz;
901.9125-901.9250 MHz;
901.9250-901.9375 MHz; and,
901.9375-901.9500 MHz.

(c) The following four 12.5 kHz unpaired channels are available for assignment on a BTA basis:

901.9500-901.9625 MHz;
901.9625-901.9750 MHz;
901.9750-901.9875 MHz; and,
901.9875-902.0000 MHz.

9. In order to correct a typographical error, Section 99.133(a)(1)(ii) is revised to read as follows:

§ 99.133 Emission limits.

(a) * * *

(1) * * *

(ii) On any frequency outside the authorized bandwidth and removed from the edge of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 40 kHz: at least 43 + 10 Log_{10} (P) decibels or 80 decibels, whichever is the lesser attenuation.

* * * * *

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Narrowband Personal Communications Services (GEN Docket No. 92-100 and ET Docket No. 92-100)

In this Memorandum Opinion and Order, the Commission adopts changes that reflect the reconsideration and clarification of the Commission's rules and pioneer's preference awards for narrowband PCS at 901-902, 930-931, and 940-941 MHz, as established in the First Report and Order in this proceeding. In particular, the provisions of the Memorandum Opinion and Order include: (1) revising the plan for licensing areas to provide larger regional and local service areas; (2) providing coverage and build-out requiements that will allow licensses to choose between population coverage requirements or the existing geographic coverage requirements; and (3) affirming the pioneer's preference granted to Mobile Telecommunications Technologies, Inc. ("MTel"), subject to certain conditions.

With respect to the distribution of varying sizes of license areas for narrowband PCS licensees, I support the Commission's action as a reasonable response to the issues raised in the reconsideration record. I write separately to emphasize that I am especially interested in the provisions that ensure that all licensees will be able to utilize flexible mechanisms -- such as management contracts or other franchising arrangements -- in fulfilling their requirements to provide narrowband PCS service. In this regard, I believe that allowing for these flexible mechanisms will promote greater geographic coverage and participation by a broad group business interests. In addition, the 2 BTA licensed retained from the prior structure will provide opportunities for small market service or additional spectrum for larger operators seeking to tailor service in particular markets.

I also believe that the coverage and build-out requirements are reasonable to the extent that licensees will have a choice of population or geographic coverage. Again, given the number of licenses provided under the revised structure, I am especially interested that the rules could result in a broad but reasonable framework for providing narrowband PCS service in a timely manner.

Finally, I am satisfied with the award of a pioneer's preference to MTel, and I support the license conditions attached to the extent that MTel begins to provide service substantially as proposed and for which it was awarded the preference. In addition, I am interested in closely reviewing comments on the economic and public policy merits of whether pioneer's preference awardees -- or, more specifically, MTel -- should become subject to different requirements than other narrowband PCS licensees.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 14, 1994

AAD 94-28

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. PETITION FOR EXTENSION OF WAIVER OF SECTIONS 36.611(a) AND 36.613(a) OF THE COMMISSION'S RULES

Public Comment Invited

On January 31, 1992, the National Exchange Carrier Association (NECA) filed a petition for waiver of sections 36.611(a) and 36.613(a) of the Commission's Rules for 1992 and 1993. Section 36.611(a) requires the exchange carriers that submit data to NECA for developing the Universal Service Fund (USF), do so on or before June 30 of each year. Section 36.613(a) requires NECA to submit these data to the Commission on or before September 1 of each year. NECA's petition requested that these dates be changed to August 31 and November 1, respectively. The purpose of these extensions was to promote filing accuracy.

The Bureau granted that waiver to the extent that the filing dates were extended to July 31 and October 1, respectively. These filing dates were chosen as a compromise to allow the carriers and NECA to have an extension in filing time, and to afford interested parties sufficient time to review the data and file timely comments. The waiver was granted for the two year trial period of 1992 and 1993, after which NECA could seek to make these modifications permanent.

On January 16, 1993 NECA filed a petition for waiver seeking an extension of the 1992 and 1993 waiver, and that the Commission consider permanent adoption of these changes in its planned USF rulemaking proceeding as referenced in CC Docket No. 80-286, 8 FCC Rcd 7114 (1993).

Interested parties should file comments regarding NECA's petition to extend the modified reporting dates granted in response to its January 31, 1992 petition, and its request that these due dates become permanent. Comments should be filed no later than March 22, 1994. Reply comments should be filed no later than March 31, 1994. Comments should reference AAD 94-28. An original and four copies of each pleading should be sent to Federal Communications Commission, Secretary, Room 222, 1919 M Street, N.W., Washington, D.C. 20554. A copy of each pleading should also be sent to Jane Frenette, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20054, and to International Transcription Service (ITS), 1919 M Street, N.W., Room 246, Washington, D.C. 20036. Copies are available for inspection and copying in Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS, (202) 857-3824.

For further information contact Jane Frenette, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-313

In the Matter of

Amendment of Section 73.202(b), RM-8140
Table of Allotments,
FM Broadcast Stations.
(Central, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 7, 1994; Released: March 14, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Mel-Mike Enterprises, Inc. ("petitioner"), the commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 365 (1993), proposing the substitution of Channel 237C1 for Channel 237C2 at Central, New Mexico, and modification of the license of Station KNUW (formerly KZTT) to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 237C1 for Channel 237C2 at Central since it could enable Station KNUW to expand its coverage area. As proposed, we will also modify Station KNUW's license to specify operation on the higher class channel.

Technical Summary

3. Channel 237C1 can be allotted to Central in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.6 kilometers (11.6 miles) northwest to accommodate petitioner's desired transmitter site and avoid short-spacings to Station KKRK, Channel 237A, Douglas, Arizona, and Station KLAQ, Channel 238C, El Paso, Texas.[1] Mexican concurrence in the allotment has been received since Central is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 28, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Central, New Mexico	237C1

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Mel-Mike Enterprises, Inc., for Station KNUW, IS MODIFIED to specify operation on Channel 237C1, in lieu of Channel 237C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Mel-Mike Enterprises, Inc., licensee of Station KNUW, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 237C1 at Central are North Latitude 32-52-15 and West Longitude 108-18-57.

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO LETTER 23
March 14, 1994

Released: March 14, 1994

Responsible Accounting Officers:

Re: ARMIS USOA Report (FCC Report 43-02) - Corrections and Clarification of Certain Tables, Instructions and Specifications

The purpose of this letter is to advise the carriers that file ARMIS USOA Report (FCC Report 43-02) that we are making minor corrections to the report for the 1993 reporting year. These changes are to the Reporting Procedures Section, Report Definition - Forms and Instructions Section, and the Automated Report Specifications Section.

Additionally, on January 31, 1994, the Commission adopted a Report and Order in CC Docket No. 89-360 incorporating the accounting for income taxes set forth in the Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 109, Accounting for Income Taxes (SFAS-109). The Report and Order adds three new accounts to Part 32 of the Rules so that carriers can adopt SFAS-109 for federal accounting purposes in a revenue neutral manner. These new accounts will be added to the ARMIS Report in 1994. The Report and Order does, however, give the carriers the option of adopting the SFAS-109 accounting changes in 1993. Since some carriers may decide to adopt SFAS-109 in 1993, we believe that the following guidance is needed on how to report this action in their 1993 ARMIS reports.

For the 1993 ARMIS reporting purposes, amounts recorded in the new Account 1437, Deferred Tax Regulatory Asset, should be added to the balance in Account 1439, Deferred Charges, and reported on the appropriate row for Account 1439, and amounts recorded in new Accounts 4341, Net Deferred Tax Liability Adjustments, and 4361, Deferred Tax Regulatory Liability, should be added to the balance in Account 4370, Other Jurisdictional Liabilities and Deferred Credits-Net, and reported on the appropriate row for Account 4370. In addition, the balances of Accounts 1437, 4341 and 4361 should be disclosed in a footnote to the appropriate ARMIS reports, e.g., ARMIS Reports 43-01, 43-02 and 43-03.

The corrections to the Reporting Procedures and Report Definition Sections along with the descriptions thereof are contained in Attachment A, and the corrections to the Automated Report Specifications Section are contained in Attachment B.

This letter and attachments are issued under Section 0.291 of the Commission's Rules. Applications for review under Section 1.115 of the Commission's Rules must be filed within 30 days from the date of public notice of this letter.

If you have any questions, contact Kenneth M. Ackerman or Virginia Brockington at (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATIONS SERVICES, INC.,
Complainant,

v.

NEW YORK TELEPHONE COMPANY,	File No. E-90-183S
NEW ENGLAND TELEPHONE COMPANY,	File No. E-90-184S
ILLINOIS BELL TELEPHONE COMPANY,	File No. E-91-030S
INDIANA BELL TELEPHONE COMPANY,	File No. E-91-031S
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-032S
OHIO BELL TELEPHONE COMPANY, and	File No. E-91-033S
WISCONSIN BELL, INC., Defendants.	File No. E-91-034S

ORDER

Adopted: March 3, 1994; Released: March 15, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On November 28, 1990, Allnet Communications Services, Inc. (Allnet), filed complaints against New York Telephone Company and New England Telephone Company (collectively NYNEX), and Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Ohio Bell Telephone Company, and Wisconsin Bell, Inc. (collectively Ameritech) alleging violations of the Commission's rules and the Communications Act of 1934, as amended, including unlawful affiliate transactions. On May 3 and 6, 1993, the Commission released orders ruling on the merits of all of Allnet's claims except those allegations regarding unlawful affiliate transactions.[1] The Commission directed the Common Carrier Bureau's Enforcement Division (Division) to establish a schedule for further proceedings in which the parties could develop a full record regarding the alleged unlawful affiliate transactions.[2] On November 18, 1993, Division staff met with the parties to establish a schedule for further proceedings.

2. On January 6, 1994, Allnet filed a limited motion for partial dismissal of its complaints in so far as they relate to defendants' alleged unlawful affiliate transactions.[3] In support of its motion, Allnet states that because of limited available resources, it is not capable of further prosecuting the affiliate transactions matter. Allnet further states that dismissal would serve the parties' best interests and preserve the Commission's resources.

3. We are satisfied that dismissal of these supplemental proceedings will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the Commission and the parties.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Limited Motion For Partial Dismissal With Respect To Affiliate Transactions filed on January 6, 1994 IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints &
Investigations Branch
Common Carrier Bureau

[1] *See* Allnet Communications Services, Inc. v. Illinois Bell Telephone Company, *et al.*, 8 FCC Rcd 3030 (1993) (*Ameritech Order*), and Allnet Communications Services, Inc. v. New York Telephone Company, *et al.*, 8 FCC Rcd 3087 (1993) (*NYNEX Order*).

[2] *Ameritech Order* at 3041, and *NYNEX Order* at 3096.

[3] Although Allnet seeks a partial dismissal with respect to affiliate transactions, we note that the Commission previously acted on the remaining claims and requests for relief set forth in Allnet's complaints. *See* Footnote 1, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,

WESTERN UNION INTERNATIONAL, INC., and

TELECOM USA INC.,
Complainants,

v.

VISTA TELEPHONE COMPANY OF IOWA,	File No. E-93-139
VISTA TELEPHONE COMPANY OF MINNESOTA,	File No. E-93-140
CENTRAL TELEPHONE COMPANY OF NEVADA,	File No. E-93-141
CENTRAL TELEPHONE COMPANY OF NORTH CAROLINA,	File No. E-93-142
CENTRAL TELEPHONE COMPANY OF TEXAS, and	File No. E-93-143
CENTRAL TELEPHONE COMPANY OF VIRGINIA,	File No. E-93-144

Defendants.

ORDER

Adopted: March 3, 1994; Released: March 15, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1993, MCI Telecommunications Corporation, Western Union International, Inc., and Telecom USA, Inc. (collectively MCI), filed complaints against Vista Telephone Company of Iowa, Vista Telephone Company of Minnesota, Central Telephone Company of Nevada, Central Telephone Company of North Carolina, Central Telephone Company of Texas, and Central Telephone Company of Virginia (collectively Central).

2. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the Commission and the parties.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Motion To Dismiss filed on January 28, 1994 IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints &
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 93-253

In the Matter of

Implementation of Section 309(j)
of the Communications Act

Competitive Bidding

ORDER

Adopted: March 8, 1994; Released: March 8, 1994

By the Commission:

1. On March 8, 1994, the Commission adopted a *Second Report and Order,* FCC 94-61, in the above-captioned proceeding relating to competitive bidding for spectrum licenses. This proceeding involves, *inter alia,* issues concerning spectrum auctions for personal communications services (PCS) and opportunities in competitive bidding for small businesses, rural telephone companies and businesses owned by members of minority groups and women. *See Notice of Proposed Rulemaking,* PP Docket No. 93-253, 8 FCC Rcd 7635 (1993). On March 14, 1994, Commission personnel are scheduled to participate in a seminar on "PCS Opportunities for Small Businesses, Women and Minorities" co-sponsored by the Young Lawyers Committee of the Federal Communications Bar Association, the Women's Bar Association of the District of Columbia, American Women in Radio and Television, and the Entrepreneurial Growth and Investment Institute.

2. This seminar will likely involve the discussion of matters relating to the *Second Report and Order* before the text is released. The Commission believes participation by Commission personnel in the seminar and presentations on the issues associated with the seminar will serve the public interest. Accordingly, on our own motion, we are waiving the Sunshine Period prohibition contained in our *ex parte* rules, 47 C.F.R. § 1.1203, for the limited purposes of permitting participation by Commission personnel in this seminar and permitting presentations on issues associated with the seminar. To achieve compliance with the *ex parte* rules, *see* 47 C.F.R. § 1.1206, a video tape of the relevant portion of the seminar involving Commission decision-makers will be placed in the record of this proceeding, as well as in GN Docket No. 90-314 -- Personal Communications Services.

3. Accordingly, IT IS ORDERED, that Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203, IS WAIVED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

KVI, Inc. File No. BAL-930812EA
(Assignor)

and

Fisher Broadcasting, Inc.
(Assignee)

For Assignment of the License of
KVI(AM), Seattle, Washington

KPLZ, Inc. File No. BALH-930812GJ
(Assignor)

and

Fisher Broadcasting, Inc.
(Assignee)

For Assignment of the License of
KPLZ-FM, Seattle, Washington

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1994; Released: March 15, 1994

By the Commission:

1. The Commission has before it the above-captioned application for assignment of the license of KVI(AM), Seattle, Washington, from KVI, Inc. ("KVI") to Fisher Broadcasting, Inc. ("Fisher"), the above-captioned application for assignment of the license of KPLZ-FM, Seattle, Washington, from KPLZ, Inc. ("KPLZ") to Fisher, and a related request for waiver of 47 C.F.R. Sec. 73.3555(c), the Commission's one-to-a-market rule.[1] Fisher is the licensee of KOMO(AM) and KOMO-TV, Channel 4, an ABC network-affiliate, Seattle, Washington. The Grade A contour of KOMO-TV encompasses all of Seattle, KVI(AM) and KPLZ-FM's community of license. The applications are unopposed.[2]

2. Fisher bases its request on the Commission's one-to-a-market waiver standards adopted in *Second Report and Order* in MM Docket No. 87-7 (*"Second Report and Order"*), 4 FCC Rcd 1741, *recon. granted in part and denied in part,* (*"Second Report and Order Recon."*), 4 FCC Rcd 6489 (1989). Under these criteria, the Commission presumptively favors waiver requests involving station combinations serving the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licenses or "voices" after the proposed combination ("top 25 market/30 voice standard"). It also favors requests involving "failed" broadcast stations, that is, stations that have not been operating for a substantial period of time, *e.g.,* four months, or that are involved in bankruptcy proceedings. *See* 47 C.F.R. Sec. 73.3555, n.7. While Fisher's waiver request meets the top 25 market/30 voice standard, it nevertheless must be reviewed under the case-by-case standard also outlined in the *Second Report and Order.*[3] Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the potential public service benefits of joint operation of the facilities; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented.

3. In support of its waiver request, Fisher submits a detailed showing which addresses each of the five case-by-case factors. Fisher first contends that the combination of KOMO(AM), KVI(AM), KPLZ-FM and KOMO-TV will create cost savings by combining news staffs as well as programming and production staffs. Fisher also maintains that savings will be realized by joint purchasing of supplies as well as the elimination of overlapping outside program services. Fisher asserts that it expects to realize significant economic efficiencies in the sharing of personnel, particularly in the engineering and administrative areas. Fisher also maintains that the proposed combination will allow the consolidation of its radio operations at the modern facilities of KVI(AM) and KPLZ-FM. Fisher further indicates that the four-station combination will "cross-promote" itself and that certain marketing and research functions will be combined. Fisher also contends that KVI(AM) and KPLZ-FM will have access to the extensive news gathering facilities of KOMO-TV, as well as its many mobile units. In sum, Fisher estimates projected savings of

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[1] Section 73.3555(c) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

[2] Since the principal community contours of KOMO(AM) and KVI(AM) overlap, Fisher must meet the requirements of the radio ownership rule found in Section 73.3555(a) of the Commission's Rules. Fisher certifies that there are at least 15 radio stations whose contours overlap the contours of the proposed commonly-owned stations. Because over 50 percent of the principal community contour overlap of same service stations KOMO(AM) and KVI(AM) occurs within the Seattle, Washington radio metro-market, as defined by Arbitron, Inc., Fisher supplies audience share data from the most recent Arbitron survey available from that market at the time the instant applications were filed. *See* 47 C.F.R. Sec. 73.3555(a)(3)(iii). Those data show that the combined audience share of KOMO(AM), KVI(AM) and KPLZ-FM in the Seattle metro-market is 12.5 percent, and therefore below the 25 percent audience share limit set forth in the Rules.

[3] Because Fisher's waiver request invokes the local ownership limits of the amended radio multiple ownership rule, found at Section 73.3555(a) of the Commission's Rules (47 C.F.R. Sec. 73.3555(a)), we require that it be evaluated under the case-by-case standard, regardless of the size of the market involved. *See In re Revision of Radio Rules and Policies,* 7 FCC Rcd 6387, 6394 n.40 (1992).

$710,000 annually from this proposed media combination as well as increased public service and programming benefits.[4]

4. Second, regarding the technical facilities involved, KOMO-TV is a VHF television station operating on Channel 4 with 100 kW effective radiated power ("ERP") and an antenna height of 810 feet above average terrain ("HAAT"). KPLZ-FM is a Class C FM station operating on Channel 268 (101.5 MHz) with 100 kW ERP and an antenna height of 1200 feet HAAT. KVI(AM) operates full time on 570 kHz with a power of 1000 watts using a non-directional antenna. KOMO(AM) operates on 1000 kHz with a full time power of 50,000 watts using a directional antenna during nighttime hours only.

5. Third, with respect to the number of other media outlets the applicant already owns in the relevant market, Fisher affirms that, other than KOMO-TV and KOMO(AM), it does not own any broadcast stations in the Seattle market.[5] As previously noted, Fisher demonstrates that, for the purposes of our local radio ownership rule, found in Section 73.3555(a)(1)(ii) of the Commission's Rules (47 C.F.R. Sec. 73.3555(a)(1)(ii)), there are at least 15 radio stations whose contours overlap the contours of the proposed commonly-owned radio stations and that the combined audience share of KVI(AM), KOMO(AM) and KPLZ-FM in the Seattle metro-market is 12.5 percent.

6. Fourth, with regard to the economic status of the stations involved in the proposed combination, Fisher states that KOMO(AM) sustained a net operating loss of nearly $1 million in 1992 and "is likely to lose $1.5 million or more in 1993." Fisher further states that it "has subsidized the losses from KOMO(AM) with revenues from KOMO-TV[,] . . . consistent with Fisher's long term commitment to the Seattle-Tacoma area." Fisher contends that in order to make KOMO(AM) viable, it must be allied with compatible stations such as KVI(AM) and KPLZ-FM. Even if it were to sell KOMO(AM), Fisher argues, the only likely purchaser would be an entity which already operates a successful radio combination in Seattle and, consequently, such a sale would not add to the diversity of the Seattle market.

7. The fifth factor relates to the nature of the relevant market in light of the Commission's concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately-owned and operated "voices" in the market, and the presence of cable and non-broadcast media. As to the number of broadcast stations, the Commission has held that, in the context of a one-to-a-market waiver, it will consider the "relevant TV metro market for radio stations and the relevant ADI [Area of Dominant Influence] TV market for TV stations." *Second Report and Order*, 4 FCC Rcd at 1760, n.101. Fisher represents that the Seattle ADI is ranked 14th in the country and contains 26 AM stations, 26 FM stations, 13 TV stations and six major daily newspapers. Fisher further indicates that if the proposed combination is approved, the approximately 65 broadcast stations in the Seattle ADI will be owned and operated by 43 different "voices." Additionally, Fisher asserts that the Seattle-Tacoma area is served by four different cable system operators, with an aggregate cable penetration of 67 percent. Finally, Fisher argues that if this waiver request did not invoke the local ownership limits of the amended radio multiple ownership rules, the request would easily meet the criteria of the top 25 market/30 voice standard which the Commission presumptively favors. In prior decisions, Fisher notes, the Commission has held that "the advantages of permitting radio-television combinations in the top 25 markets, which have numerous competing voices, generally would not undermine the benefits derived from the Commission's traditional pro-competitive and diversity policies." *The Helen Broadcasting Co. Limited Partnership*, 5 FCC Rcd 2829, 2833 (1990).

8. In evaluating a request for a waiver of the one-to-a-market rule, the Commission's goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *Second Report and Order Recon.*, 4 FCC Rcd at 6491.[6] We conclude that Fisher's showing in support of a waiver of the one-to-a-market rules meets our case-by-case criteria, and that a waiver in this instance is consistent with the public interest and would not have an adverse effect on diversity and competition in the Seattle market.[7]

9. Fisher has shown that joint operation of the stations will result in significant cost savings as well as the potential for enhanced programming and service benefits. Furthermore, Fisher has demonstrated that the proposed combination will not create any undue concentration of ownership or control of the broadcast media in the Seattle market. The Seattle market will be served by 52 radio stations and 13 television stations. Those 65 stations will be owned and operated by 43 separate entities. In addition, the other "voices" in the Seattle market include six major daily newspapers and cable television, which has a penetration of 67 percent. Fisher owns no other media in the market. With respect to the technical facilities involved, we note that the proposed combination does not present issues of market dominance inconsistent with the public interest.[8]

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[4] Fisher estimates that the consolidation of administrative staff of the four stations will save $150,000, that sharing programming, production, promotion and accounting personnel will save $200,000, that combining programming purchases as well as subscriptions to other broadcast industry services functions will save $93,000 and that, in total, sales efficiencies and economies of scale realized through the co-ownership of the three radio stations could reach $710,000.

[5] Fisher notes that it was once before the licensee of two AM stations in Seattle. Fisher states that "[f]or a number of years prior to 1945, Fisher operated both KOMO(AM) and KJR(AM), providing service over the NBC Blue' and Red' networks for the Seattle area." Fisher further states that it voluntarily divested itself of KJR(AM) in the mid-1940's "as the Commission was considering changes in a number of its policies . . . ."

[6] It should be also be noted that "[n]ot all of the factors mentioned will be relevant in every case." *Second Report and Order Recon.*, 4 FCC Rcd at 6491.

[7] *See Moosey Communications, Inc.*, 8 FCC Rcd 5247 (1993) (consideration of one-to-a-market waivers under the case-by-case standard still appropriate where new radio-TV combinations are created, pending the possible revision of the one-to-a-market rule in the outstanding TV ownership proceeding under MM Docket No. 91-221).

[8] While the instant applications propose the common ownership of significant stations, we note that there is substantial competition in the Seattle market. According to the relevant Spring 1993 Arbitron Radio Local Market Report for the Seattle, Washington Survey Area, KOMO(AM) was ranked sixth

Thus, we are persuaded that the public benefits of common ownership and joint operation of KOMO-TV, KOMO(AM), KVI(AM) and KPLZ-FM outweigh any negative effect on diversity and competition in the Seattle market that the combination might engender. The Commission, in the past, has granted waivers of the one-to-a-market rule under similar circumstances. *See, e.g., Great American Radio and Television Co., Inc.*, 4 FCC Rcd 6347 (1989); *Moosey Communications, Inc.*, 8 FCC Rcd 5247 (1993).

10. Accordingly, IT IS ORDERED, That the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. Sec. 73.3555(c), IS HEREBY GRANTED. Further, having found the applicants otherwise qualified, the application (File No. BAL-930812EA) for assignment of the license of KVI(AM), Seattle, Washington, from KVI, Inc. to Fisher Broadcasting, Inc., and the application (File No. BALH-930812GJ) for assignment of the license of KPLZ-FM, Seattle, Washington, from KPLZ, Inc. to Fisher Broadcasting, Inc., ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

with a 4.9 share, KVI(AM) ranked seventh with a 4.5 share, and KPLZ-FM ranked thirteenth with a 3.1 share. *See United Radio Group, Inc.*, 7 FCC Rcd 2207, 2209 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BREM Broadcasting (Assignor) — File Nos. BAL-930107EA, BALH-930107EB

and

WKRG-TV, Inc.
(Assignee)

For Assignment of the Licenses of
WCOA(AM) and WJLQ-FM,
Pensacola, Florida

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1994; Released: March 15, 1994

By the Commission: Commissioner Barrett concurring and issuing a statement.

1. The Commission has before it the above-captioned applications for assignment of the licenses of WCOA(AM) and WJLQ-FM, Pensacola, Florida, from BREM Broadcasting ("BREM") to WKRG-TV, Inc. ("WKRG") and a related request for waiver of 47 C.F.R. Sec. 73.3555(c), the Commission's one-to-a-market rule.[1] WKRG-TV is the licensee of WKRG(AM), WKRG-FM and VHF television "station WKRG-TV, Mobile, Alabama.[2] The Grade A contour of WKRG-TV encompasses all of Pensacola, WCOA(AM) and WJLQ-FM's community of license. The applications are unopposed.

2. WKRG bases its request on the Commission's one-to-a-market waiver standards adopted in *Second Report and Order* in MM Docket No. 87-7 (*"Second Report and Order"*), 4 FCC Rcd 1741, *recon. granted in part and denied in part*, (*"Second Report and Order Recon."*), 4 FCC Rcd 6489 (1989).[3] Under these criteria, the Commission presumptively favors waiver requests involving station combinations serving the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licenses or "voices" after the proposed combination ("top 25 market/30 voice standard"). It also favors requests involving "failed" broadcast stations, that is, stations that have not been operating for a substantial period of time, *e.g.*, four months, or that are involved in bankruptcy proceedings. *See* 47 C.F.R. Sec. 73.3555, n.7. Because the waiver requested by WKRG does not meet the top 25 market/30 voice or the failed-station standard, WKRG seeks review of its waiver request under the case-by-case standard also outlined in the *Second Report and Order*.[4] Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the potential public service benefits of joint operation of the facilities; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented.

3. In support of its waiver request, WKRG submits a detailed showing which addresses each of the five case-by-case factors. WKRG first contends that although the two AM/FM radio combinations involved are licensed to different communities in different states, the stations will still be able to create cost savings by consolidating sales offices, sharing equipment, and securing volume discounts on purchases of supplies. WKRG asserts that it expects to realize significant economic efficiencies in the sharing of personnel, particularly in the engineering, administrative and accounting areas. WKRG also maintains that programming and sales personnel will be shared among the stations, as will the professional services provided by attorneys, accountants, financial institutions and insurance carriers. WKRG further indicates that the five-station combination will "cross-promote" itself and that certain marketing and research functions will be combined. WKRG also contends that WCOA(AM) and WJLQ-FM will have access to the extensive news gathering facilities of WKRG-TV, which employs over forty people, as well as access to WKRG-TV's extensive public affairs programming expertise. In total, WKRG estimates projected savings of over $200,000 an-

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[1] Section 73.3555(c) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

[2] WKRG's ownership of these three stations predates the Commission's adoption of the "one-to-a-market" provision of the multiple ownership rules, and is therefore "grandfathered." *See* 47 C.F.R. Sec. 73.3555(b).

[3] Since the principal community contours of WKRG-FM and WJLQ-FM overlap, WKRG must meet the requirements of the radio ownership rule found in Section 73.3555(a) of the Commission's Rules. WKRG certifies that there are at least 15 radio stations whose contours overlap the contours of the proposed commonly-owned stations. Because over 50 percent of principal community contour overlap of same service stations WKRG-FM and WJLQ-FM occurs within the Mobile, Alabama radio metro-market, as defined by Arbitron, Inc., WKRG supplies audience share data from the most recent Arbitron survey available from that market at the time the instant applications were filed. *See* 47 C.F.R. Sec. 73.3555(a)(3)(iii). Those data show that the combined audience share of WKRG(AM), WKRG-FM, WCOA(AM) and WJLQ-FM in the metro-market is 14.6 percent. WKRG has also demonstrated that the combined audience share figure for the four radio stations in Pensacola, Florida, is also below the 25 percent audience share limit set forth in the rules. We note that there is no overlap between the principal community contours of the two AM stations, WKRG(AM) and WCOA(AM).

[4] In any event, because WKRG's acquisition of WCOA(AM) and WJLQ-FM invokes the local ownership limits of the amended radio multiple ownership rule, found at Section 73.3555(a) of the Commission's Rules (47 C.F.R. Sec. 73.3555(a)), we would evaluate its waiver request under the case-by-case standard, regardless of the size of the market involved. *See In re Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6394 n.40 (1992).

nually from this proposed media combination as well as increased public service benefits and programming benefits.[5]

4. Second, regarding the technical facilities involved, WKRG-TV, Mobile's CBS-affiliate, is a full power VHF television station operating on Channel 5. WKRG-FM and WJLQ-FM are both Class C FM stations. WKRG-FM operates on Channel 260C (99.9 MHz) with an effective radiated power ("ERP") of 94 kW and an antenna height of 535 meters above average terrain ("HAAT") while WJLQ-FM operates on Channel 264C (100.7 MHz) with an ERP of 100 kW and an antenna height of 474 meters HAAT. WKRG(AM) operates on 710 kHz with a daytime power of 1000 watts and a nighttime power of 500 watts using a directional antenna during nighttime hours only. WCOA(AM) operates on 1370 kHz with a daytime power of 5000 watts and a nighttime power of 5000 watts using a directional antenna during nighttime hours only. WKRG contends that the most salient fact about these facilities is that WCOA(AM) and WJLQ-FM are licensed to different communities in different states from the stations which WKRG already owns. WKRG notes that Pensacola, Florida is a distinct and separate radio metro market from Mobile, Alabama, as designated by Arbitron, Inc. WKRG further notes that local issues of importance are covered by WKRG(AM)/WKRG-FM and WCOA(AM)/WJLQ-FM in their respective communities.

5. Third, with respect to the number of other media outlets the applicant already owns in the relevant market, WKRG affirms that, other than WKRG-TV, WKRG-FM and WKRG(AM), it does not own any broadcast stations in the Mobile-Pensacola market.[6] As previously noted, WKRG demonstrates that, for the purposes of our local radio ownership rule, found in Section 73.3555(a)(1)(ii) of the Commission's Rules (47 C.F.R. Sec. 73.3555(a)(1)(ii)), there are at least 16 radio stations whose contours overlap the contours of the proposed commonly-owned radio stations and that the combined audience share of WKRG(AM), WKRG-FM, WCOA(AM) and WJLQ-FM in the relevant radio metro-market is 14.6 percent.

6. Fourth, with regard to the economic status of the stations involved in the proposed combination, WKRG contends that since BREM acquired WCOA(AM) and WJLQ-FM on February 28, 1991, the stations have sustained continuous revenue losses and "can only be classified as failing stations." As proof, WKRG offers the financial statements for the two stations for the year ending December 31, 1991 and the ten months ending October 31, 1992. According to these reports, WCOA(AM) and WJLQ-FM sustained a net operating loss of $538,793.59 in 1991. In 1992, the two stations sustained a net operating loss of $402,998.75. WKRG asserts that the stations have been able to maintain operations only because of loans of $ 525,122.54 made to BREM by Phase II Broadcasting, Inc. ("Phase II"), which is owned by Edmond J. Muniz, a partner in BREM.[7] Without these regular contributions by Phase II, WKRG argues, BREM may be forced to discontinue operation of the two stations. WKRG also notes that, despite two years of listing WCOA(AM) and WKLQ-FM with media brokers, WKRG is the only *bona fide* purchaser BREM has been able to identify for the two stations.[8]

7. The fifth factor relates to the nature of the relevant market in light of the Commission's concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately-owned and operated "voices" in the market, and the presence of cable and non-broadcast media. As to the number of broadcast stations, the Commission has held that, in the context of a one-to-a-market waiver, it will consider the "relevant TV metro market for radio stations and the relevant ADI TV market for TV stations." *Second Report and Order*, 4 FCC Rcd at 1760, n.101. WKRG represents that the Mobile-Pensacola ADI is ranked 61st and contains 11 TV stations. WKRG also states that there are 21 AM stations and 20 FM stations currently licensed to communities in the Mobile-Pensacola TV metro market. WKRG further indicates that if the proposed combination is approved, the 52 broadcast stations in the Mobile-Pensacola ADI will be owned and operated by 40 different "voices." Additionally, WKRG asserts that the Mobile-Pensacola area is served by three daily newspapers, 10 weekly newspapers and has "at least a dozen separately owned cable system operators, with an aggregate cable penetration of 64 percent." Finally, WKRG notes that the "rich diversity" of the Mobile-Pensacola market approximates that of a top-25 market in terms of competition. In prior rulings, WKRG argues, the Commission has granted waivers under the case-by-case standard to AM/FM/TV licensees where the level of diversity and competition, and the comparable operating efficiencies realized by the stations in question, were similar to those in a top-25 market. *See Great American Television and Radio Co., Inc.*, 4 FCC Rcd 6350 (1989).[9] WKRG also notes that the waiver sought in *Great American* was granted despite

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[5] WKRG estimates that the consolidation of sales offices of five stations will save $20,000, that sharing programming and sale personnel will save $75,000, that combining marketing and research functions should save $50,000, and that sales efficiencies realized through the co-ownership of the four radio stations should save $75,000.

[6] WKRG further states that it does not own any other broadcast stations or media interests in the United States.

[7] WKRG notes that Phase II is the licensee of WLTS-FM, Slidell, Louisiana, and WYAT(AM), New Orleans, Louisiana, and concludes that the losses sustained by BREM and underwritten by Phase II jeopardizes the existing operations of these two stations.

[8] WKRG also states that prior to BREM's purchase agreement with WKRG, BREM had been unsuccessful in its efforts to enter into a local marketing agreement ("LMA") with other local stations. We note that BREM currently has an LMA with WKRG for WCOA(AM) and WJLQ-FM.

[9] In *Great American*, the Commission granted a permanent one-to-a-market waiver to Great American Television and Radio Co., Inc. ("Great American") after the company had acquired Taft Broadcasting Company ("Taft"), licensee of WKRC-TV, WKRC(AM) and WKRQ-FM, Cincinnati, Ohio and WDAF-TV, WDAF(AM) and KYYS-FM, Kansas City, Missouri. Taft's common ownership of co-located television and radio stations in Cincinnati and Kansas City was authorized pursuant to the grandfathering provisions of the Commission's multiple ownership rules. Because the grandfathered status of prohibited combinations does not survive a transfer of control, Great American was obliged to resolve the cross-ownership violations its acquisition of Taft would create. Great American was granted a waiver under the Commission's case-by-case standard after the Commission determined that Great American had shown that a "robust level of voice diversity and economic competition [existed] among media outlets in both Cincinnati and Kansas City. . . ." by documenting "fully 35 separately owned broadcast voices in Cincinnati and 33 such voices in Kansas City." 4 FCC Rcd at 6350.

the fact that "substantial stations" were involved and there was no showing that any of the stations were in financial distress. WKRG concludes that the combination at issue in the instant applications supports a more compelling case for waiver than those involved in *Great American* because the Mobile-Pensacola market is more diverse than the markets involved therein, the stations being acquired have endured financial hardships, and substantial economic efficiencies would be realized by the proposed consolidation.

8. In evaluating a request for a waiver of the one-to-a-market rule, the Commission's goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *Second Report and Order Recon.*, 4 FCC Rcd at 6491.[10] We conclude that WKRG's showing in support of a waiver of the one-to-a-market rules meets our case-by-case criteria, and that a waiver in this instance is consistent with the public interest and would not have an adverse effect on diversity and competition in the Mobile-Pensacola market.[11]

9. WKRG has shown that joint operation of the stations will result in significant cost savings as well as the potential for enhanced programming and service benefits. It has been further established that WCOA(AM) and WJLQ-FM have consistently lost money and have shown a negative cash flow since their present owner acquired the stations two years ago. Furthermore, WKRG has demonstrated that the proposed combination will not create any undue concentration of ownership or control of the broadcast media in the Mobile-Pensacola market. The Mobile-Pensacola TV metro market will be served by 41 radio stations and the Mobile-Pensacola ADI will be served by 11 television stations. Those 52 stations will be owned and operated by 40 separate entities. In addition, the other "voices" in the Mobile-Pensacola market include three daily newspapers, more than twelve weekly newspapers and cable television, which has a penetration of 64 percent. WKRG owns no other media in the market or in the country. With respect to the technical facilities involved, we note that the proposed combination does not present issues of market dominance inconsistent with the public interest.[12] Thus, we are persuaded that the public benefits of common ownership and joint operation of WKRG-TV, WKRG(AM), WKRG-FM, WCOA(AM) and WJLQ-FM outweigh any negative effect on diversity and competition in the Mobile-Pensacola market that the combination might engender. The Commission, in the past, has granted waivers of the one-to-a-market rule under similar circumstances. *See, e.g., Great American Radio and Television Co., Inc., supra; Moosey Communications, Inc.*, 8 FCC Rcd 5247 (1993).

10. Accordingly, IT IS ORDERED, That the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. Sec. 73.3555(c), IS HEREBY GRANTED. Further, upon finding the applicants otherwise qualified, the applications (File Nos. BAL-930107EA, BALH-930107EB) for assignment of the licenses of WCOA(AM) and WJLQ-FM, Pensacola, Florida, from BREM Broadcasting to WKRG-TV, Inc. ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[10] It should also be noted that "[n]ot all of the factors mentioned will be relevant in every case." *Second Report and Order Recon.*, 4 FCC Rcd at 6491.

[11] *See Moosey Communications, Inc.*, 8 FCC Rcd 5247 (1993) (consideration of one-to-a-market waivers under the case-by-case standard still appropriate where new radio-TV combinations are created, pending the possible revision of the one-to-a-market rule in the outstanding TV ownership proceeding under MM Docket No. 91-221).

[12] While the instant application proposes the common ownership of significant stations, we note that there is substantial competition in the particular market. Two AM/FM combinations, WKSJ(AM)-FM and WBLX(AM)-FM, each had higher combined audience shares than the proposed four-station combination in the Mobile metro-market while a stand-alone FM station, WXBM-FM, had a higher audience share than the four-station combination in the Pensacola metro-market. *See United Radio Group, Inc.*, 7 FCC Rcd 2207, 2209 (1992).

CONCURRING STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: In re Applications of BREM Broadcasting and WKRG-TV, Inc. for Assignment of the Licenses of WCOA(AM) and WJLQ-FM, Pensacola, Florida

This Memorandum Opinion and Order grants an assignment of license and request for waiver of the Commission's television one-to-a-market rule to WKRG-TV, Inc., the licensee of WKRG(AM) and WKRG-FM as well as WKRG-TV in Mobile, Alabama permitting the licensee to purchase WCOA(AM) and WJLQ-FM which are both licensed in Pensacola, Florida.

I renew my concern that, in effect, the Commission is revising its multiple ownership rules through the waiver process.[1] Thus, I concur in today's decision and restate my belief that the pending rulemaking proceeding, not the continued grant of waiver requests, presents the more appropriate forum for the Commission to render modifications to its multiple ownership policies.

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[1]See Pegasus Broadcasting, 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett). See also In re: Act III Broadcasting of Buffalo, 8 Fcc Rcd 885 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett); Sunshine Television, Inc., 8 FCC Rcd 4428 (1993) (Statement of Commissioner Andrew C. Barrett- Concurring in Part); H & C Communications, Inc., 73 RR2d 1108 (1993) (Concurring Statement of Commissioner Andrew C. Barrett) and WOI-TV, 9 FCC Rcd 481 (1993) (Concurring Statement of Commissioner Andrew C. Barrett).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-314

In the Matter of

Amendment of the Commission's Rules to Establish New Personal Communications Services	RM-7140, RM-7175, RM-7618 PP-6 through PP-10, PP-12, PP-13, PP-15 through PP-20, PP-26, PP-27, PP-41 through PP-52, PP-54 through PP-68, PP-70, PP-72 through PP-78

THIRD REPORT AND ORDER

Adopted: December 23, 1993; Released: February 3, 1994

By the Commission: Chairman Hundt not participating; Commissioners Quello, Barrett, and Duggan issuing separate statements.

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INTRODUCTION

1. By this action, the Commission recognizes the pioneering efforts of American Personal Communications (APC), Cox Enterprises, Inc. (Cox), and Omnipoint Communications, Inc. (Omnipoint) and grants each a pioneer's preference for a personal communications service (PCS) license. APC is granted a pioneer's preference for its development and demonstration of technologies that facilitate spectrum sharing by PCS and fixed microwave users operating in the 2 GHz band. Cox is granted a preference for its development and demonstration of PCS/cable plant interface technology and equipment that results in a spectrum-efficient application for PCS services. Omnipoint is granted a preference for its development of 2 GHz equipment utilizing advanced techniques that will facilitate the continued development and implementation of PCS services and technologies. We are denying 47 additional pioneer's preference requests.

2. By virtue of receiving a pioneer's preference, each entity will not be subject to competing applications for a license within a PCS service area. As discussed in paras. 75-80, *infra*, we are designating for use by each pioneer Channel Block A, 30 megahertz at 1850-1865 and 1930-1945 MHz. APC's service area is the Major Trading Area (MTA) that includes Washington, D.C. and Baltimore, Maryland; Cox's service area is the MTA that includes San Diego, California; and Omnipoint's service area is the MTA that includes northern New Jersey. We note that both PCS channel blocks and service areas are the subject of petitions for reconsideration and clarification.[1] Should either PCS channel blocks or service areas be amended on reconsideration, the pioneer's preferences will be modified accordingly.

BACKGROUND

3. The Commission's pioneer's preference rules provide a means of extending preferential treatment in its licensing process to parties that demonstrate their responsibility for developing new communications services and technologies.[2] These rules are intended to foster development of new services and improve existing services by reducing the delays and risks innovators otherwise would face with the Commission's licensing process.

4. To be granted a pioneer's preference, an applicant must demonstrate that it has developed the new service or technology; *e.g.*, that it has developed the capabilities or possibilities of the service or technology or has brought the service or technology to a more advanced or effective state. The applicant also must demonstrate the technical feasibility of the new service or technology, either by submitting a technical feasibility showing or having submitted at least preliminary results of an experiment. Finally, a preference will be granted only if the rules adopted are a reasonable outgrowth of the proposal and lend themselves to grant of a preference.[3] In the *Pioneer's Preference Report and Order*, we stated: "[I]t will be our general policy to award a preference to any otherwise qualified innovator meeting our standard even if the Commission's final rules for the service are not identical to the innovator's original proposal. However, if the modifications are so significant that the particular innovator does not meet the eligibility standard, we will not award a preference to that innovator." We further stated that "any pioneer's preference would become final (and its scope determined) if final rules are adopted that are generally similar to the innovator's proposal."[4] An applicant meeting the pioneer's preference standard will be placed on a pioneer's preference track, will not be subject to competing applications, and if otherwise qualified will receive a license. Other applicants will compete for additional licenses on a separate track.[5]

5. The first pioneer's preference was awarded to Volunteers in Technical Assistance (VITA) for being the first to develop and demonstrate the feasibility of using a low-Earth orbit satellite system on VHF/UHF frequencies for civilian digital message communications purposes.[6] The second award was made to Mobile Telecommunication Technologies Corporation (Mtel) for developing and testing an innovative new 900 MHz narrowband PCS technology that will increase spectrum efficiency.[7]

6. In the *Tentative Decision and Memorandum Opinion and Order* (*Tentative Decision*) in this proceeding we noted that 2 GHz PCS has created unprecedented interest in new technologies and services. The Commission received pioneer's preference requests related to 2 GHz PCS from 89 applicants, of which 50 were accepted for consideration.[8] These 50 requests were placed on public notice and comment was solicited on them. In October 1992, we tentatively found that APC, Cox, and Omnipoint merited

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[1] *See Public Notice*, Report No. 1992, December 13, 1993.

[2] The pioneer's preference regulations are codified at 47 C.F.R. §§ 1.402, 1.403, 5.207 (1992). *See* Establishment of Procedures to Provide a Preference, *Report and Order*, 6 FCC Rcd 3488 (1991) (*Pioneer's Preference Report and Order*); recon. granted in part, *Memorandum Opinion and Order*, 7 FCC Rcd 1808 (1992) (*Pioneer's Preference Recon. Order*); further recon. denied, *Memorandum Opinion and Order*, 8 FCC Rcd 1659 (1993) (*Pioneer's Preference Further Recon. Order*). We are reviewing our pioneer's preference rules to assess the effect of authority to assign licenses by competitive bidding, *see* Review of the Pioneer's Preference Rules, *Notice of Proposed Rule Making*, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993). In the *First Report and Order* in that proceeding, we decided not to apply any changes to pioneer's preference proceedings in which Tentative Decisions have been made, *see* FCC 93-551, released January 28, 1994.

[3] *See* 47 CFR § 1.402.

[4] *See Pioneer's Preference Report and Order*, *supra* note 2, 6 FCC Rcd at 3495, 3497.

[5] *See Pioneer's Preference Further Recon. Order*, *supra* note 2, 8 FCC Rcd at 1659.

[6] *See* Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, *Report and Order*, ET Docket No. 91-280, 8 FCC Rcd 1812 (1993) (award to VITA).

[7] *See* Establishment of New Personal Communications Services, *First Report and Order*, GEN Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162 (1993) (award to Mtel), *recon. pending, appeals pending sub nom. BellSouth Corp. v. FCC*, No. 93-1518 (D.C. Cir. filed August 20, 1993); *Freeman Engineering Associates, Inc. v. FCC*, No. 93-1519 (D.C. Cir. filed August 23, 1993).

[8] The remaining 39 were incomplete and dismissed for failing to provide basic information required by the Commission's rules, *see Tentative Decision and Memorandum Opinion and Order*, GEN Docket No. 90-314, 7 FCC Rcd 7794, 7809-13 (1992), *appeal pending sub. nom. Adams Telcom, Inc. v. FCC*, No. 93-1103 (D.C. Cir. filed February 2, 1993). Six additional pioneer's requests relating to 900 MHz narrowband PCS were

preferences and that the remaining requests should be denied. A large number of responses were filed to our *Tentative Decision. After carefully reviewing these submissions, we conclude that APC, Cox, and Omnipoint meet the pioneer's preference standard and therefore merit award of preferences, and that the remaining requests do not meet this standard and therefore do not merit award of preferences.*

DISCUSSION

Pioneer's Preferences Granted

7. APC, Cox, and Omnipoint have led the way in developing specific PCS services and innovative system designs or components. Each applicant has demonstrated the technical feasibility of their designs through development and testing of experimental systems. APC is granted a preference for having developed and demonstrated technologies that facilitate spectrum sharing by mobile PCS and fixed microwave systems at 2 GHz. Such sharing will facilitate implementing new PCS service in a timely manner. Cox is granted a preference for having developed and demonstrated the feasibility of innovatively using cable television facilities as part of the PCS infrastructure. Omnipoint is granted a preference for having designed and manufactured a 2 GHz spread spectrum handset and associated base station equipment.

8. To ensure the integrity of our pioneer's preference policies, we are directing the relevant licensing bureau to condition each 2 GHz PCS license obtained through the pioneer's preference process upon the licensee building a system that substantially uses the design and technologies upon which its preference award is based. This condition is consistent with our award of a dispositive pioneer's preference. In the *Pioneer's Preference Report and Order*, we observed that the risk an innovator takes is that it may not be able to translate its developmental work into full business operation. We also observed that an otherwise-qualified innovator would risk that the Commission may not authorize its proposed service.[9] It is inherent in our pioneer's preference policy that the innovator use the technology upon which its preference is based. This condition will apply in the service area for which the preference is being granted and for the initial required five year build-out period[10] specified in the rules for 2 GHz PCS adopted in this docket.[11]

9. Additionally, we require the licensing bureau to condition the grant of 2 GHz PCS licenses awarded under our pioneer's preference rules on holding the license for a minimum of three years or until the construction requirements applicable to the five-year build-out period have been satisfied, whichever is earlier. This condition is consistent with the Commission's policies established in the initial pioneer's preference rulemaking. There, the Commission prohibited transfer of a preference on the grounds that the Commission did not intend to create a "futures market" in preferences.[12] Allowing licensees to transfer pioneer's preference licenses before substantial build-out has occurred would be tantamount to allowing the transfer of the preference, and would subvert the purpose of the pioneer's preference policy to "help ensure that innovators have an opportunity to participate in new services that they take a lead in developing ..."[13] As the Commission recognized in the initial rulemaking, however, there may be circumstances, such as the sale of the company itself, that would result in the transfer of a preference but would not thwart the Commission's policies.[14] We would not preclude requests for waiver of the prohibition on transfer of licenses under these extraordinary circumstances.

10. *American Personal Communications, Inc. (PP-6).* APC requests a pioneer's preference for having developed and demonstrated technologies that facilitate spectrum sharing by PCS and fixed microwave systems at 2 GHz. APC argues that its Frequency Agile Sharing Technology (FAST) system, designed to use spectrum that APC demonstrated to be available in the 2 GHz band, will facilitate spectrum sharing by PCS and microwave users.

11. In November 1989, APC filed an application for an experimental license to conduct tests related to PCS. In 1991, APC submitted an examination of existing fixed microwave use of the 1850-1990 MHz band in the 11 largest markets.[15] APC's analysis and testing demonstrate the existence of unused spectrum in the band sufficient to permit initiation of PCS without first relocating existing licensees. The report concluded that enough spectrum is available in the largest metropolitan areas to initiate a commercially viable PCS service if 2.5 megahertz channels are used and "exclusion zones" engineered around existing operations. The exclusion zones were designed to protect existing fixed microwave operations from interference by preventing PCS use of co-channel and adjacent channel frequencies in the proximity of microwave receivers. The boundaries of the exclusion zones were calculated based upon an algorithm that considers three factors:[16] an absolute minimum distance from a microwave reception point in all directions,[17]

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tentatively denied in the *Tentative Decision*. These six requests were denied in the *First Report and Order* in GEN Docket No. 90-314 and ET Docket No. 92-100, *supra* note 7.

[9] *See Pioneer's Preference Report and Order, supra* note 2, 6 FCC Rcd at 3492.

[10] *See Second Report and Order*, GEN Docket No. 90-314, 8 FCC Rcd 7700 at 7754 (1993); *recon. pending*. We did not take final action on 2 GHz PCS pioneer's preference requests in the *Second Report and Order* because of the complexity of the issues in this docket and because we had not completed our review of the relationship between recently-enacted competitive bidding authority to PCS licensing and to the pioneer's preference program. *Id.* at 7704.

[11] The Commission will consider a waiver only in a case in which there is an overriding national objective that may be thwarted; such as if nationwide PCS interoperability were to be thwarted.

[12] *See Pioneer's Preference Report and Order, supra* note 2, 6 FCC Rcd at 3496.

[13] *Id.* at 3488.

[14] *Id.* at 3496.

[15] *See* APC's Fourth Progress Report at Appendix I. The markets studied were New York, Los Angeles, Chicago, Washington, Philadelphia, Detroit, Boston, Dallas, Houston, Miami, and San Francisco.

[16] APC's exclusion zone calculations assume a PCS base station transmitting antenna height of 30 feet and transmission at an effective radiated power of 1 watt across the entire 2.5 megahertz channel.

[17] For co-channel frequencies, APC considered any point with-

a minimum distance in the main beam of the microwave receive antenna,[18] and an assumed main microwave beamwidth.[19]

12. APC developed its FAST technology to permit locating its PCS base stations in a manner that allows using the available spectrum for PCS without an immediate need to relocate microwave incumbents. As explained by APC,[20] FAST is a frequency planning and management tool used to predict (and avoid) interference both between private operational fixed service (POFS) and PCS systems, and within a PCS system. The FAST system utilizes theoretical interference analyses verified by signal strength measurements to determine frequency assignments to PCS base stations. This function is accomplished by a Channel Utilization Controller (CUC), which monitors and determines the channels each PCS base station may use. The CUC monitors coverage and interference; analyzes and integrates measured data; integrates supporting databases; and supports data communications links to each PCS base station. For each PCS base station the CUC calculates theoretical interference values and areas for every POFS station in its database. Both PCS-to-POFS and POFS-to-PCS interference is calculated. The CUC then compiles a list of available channels for each base station. The theoretical interference analysis is recalculated when PCS and/or POFS systems are changed.

13. In addition, the CUC periodically instructs each base station to measure the signal strength of each microwave channel. To accomplish this measurement, the base station receiver tunes to each microwave channel and measures the signal level. The signal strength data is transmitted back to the CUC, which uses the measured data to verify the accuracy of the theoretical interference analysis. After analysis, the CUC downloads to each base station its respective available channel list. APC states that the verification procedure typically would be done on about a monthly basis, more often when the system is first installed and less afterwards.

14. The specific channel assigned to a call is controlled by a protocol in the call set-up procedure. When a subscriber's PCS mobile unit[21] places or receives a call, the subscriber unit first measures the power on every channel in the available channel list (ACL) (base station transmit, subscriber unit receive), then transmits to the base station on the control channel (base station receive side of channel pair) a request for a voice channel. Also transmitted to the base station are the measurements taken by the subscriber unit on each of the channels in the ACL.

15. PCS base stations continually, *i.e.*, every second, measure signal strengths on every voice channel in the ACL (base station receive, subscriber unit transmit). The voice channels in the ACL are ranked by ascending signal strength, the channel ranked number 1 having the least amount of measurable power. When the base station receives the subscriber unit's measured data, it ranks the subscriber unit's channels according to the same criteria. For each channel, the base station adds the subscriber unit rank to the base station rank and selects the channel with the lowest total rank. The base station then transmits a message to the subscriber unit on the control channel to select the specific voice channel to be used for the call being set up. By this method the best available channel is selected for each call and interference to or from fixed microwave or other PCS operations prevented. Other mechanisms, such as continual monitoring of the carrier to interference ratio by both base station and subscriber unit, are utilized to ensure that high quality communications continue for the duration of the call. This protocol provides an additional measure of protection from interference to ensure that the best available channel is selected for each call.

16. APC states that FAST technology can be used with any relatively narrowband PCS system channel architecture employing a channel bandwidth of 5 megahertz or less. In particular, APC states that the FAST system can be used in conjunction with code division multiple access (CDMA), time division multiple access (TDMA), time division duplexed (TDD), and frequency division duplexed (FDD) systems that use various transmit-receive frequency (channel) separations.

17. Finally, APC states that testing of its FAST/CDMA system verified the ability of its technology to complete PCS calls without causing interference to existing microwave operations. APC maintains that its FAST/CDMA system, operational in downtown Washington, D.C. since October 23, 1992, integrates Qualcomm Inc.'s (Qualcomm's) narrowband CDMA system with FAST.[22] The 1.25 megahertz FDD channels employ a transmit-receive separation of 80 megahertz and each PCS base station transmits a pilot signal in each channel.[23] The mobile station scans the base station transmit channels and locks onto the strongest pilot signal, which determines the mobile transmit center frequency.

18. In the *Tentative Decision* we proposed to grant APC a preference for its development and demonstration of technologies that facilitate spectrum sharing at 2 GHz by PCS and existing fixed microwave licensees. A number of parties oppose our tentative grant to APC.

19. In comments to the *Tentative Decision*, Bell Atlantic Personal Communications, Inc. (Bell Atlantic) and GTE Service Corporation (GTE) state that APC's proposal is not significantly innovative. Bell Atlantic asserts that APC's FAST method of frequency selection is the only technology it reasonably can claim to have developed and that this

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in 4.0 miles of a microwave station to be in the exclusion zone. For adjacent channels, any area within a radius of 1.6 miles was considered to be in the exclusion zone. Both values are based upon empirical interference analyses.

[18] A distance of 25.75 miles was selected to require PCS facilities to be beyond the radio horizon, as viewed from a co-channel receiver. A distance of 14.9 miles was selected for adjacent channel frequencies using empirical interference analyses.

[19] A 10^0 main beamwidth was selected, based upon the beamwidths of typical microwave receive antennas.

[20] A detailed description of APC's technology is contained in APC's Seventh Progress Report, dated April 28, 1992, and supplemented by other submissions in both this docket and in the experimental file.

[21] For purposes of this *Report and Order*, the term "mobile unit" is used in a generic sense to include "portable unit."

[22] APC's FAST/CDMA system is comprised of three base stations, a Qualcomm Telephone Switching Office, and 24 subscriber units. *See* APC's Ninth Progress Report.

[23] The pilot uses 20% of the RF energy transmitted on the channel. The remaining 80% is available to transmit the communications itself.

technology is unremarkable because it is simply frequency management combined with the dynamic allocation technique used by second generation cordless telephone (CT-2) systems. Bell Atlantic asserts that the Commission already has determined that CT-2 technology does not warrant a preference and, since incumbent 2 GHz licensees can be relocated easily, APC's proposal has little relevance or value in facilitating provision of PCS at 2 GHz.[24] GTE also argues that APC's FAST approach is not unique, and states that FAST works only if unduly large quantities of spectrum are licensed to each PCS operator.[25] GTE states that PCN America, Inc. (PCNA) discussed an approach similar to FAST in its original petition, and that an analogous approach that has existed for many years is the licensing of narrowband Amplitude Compandored Single Sideband (ACSB) systems on interstitial land mobile channels between wideband channels.

20. In response to Bell Atlantic's arguments, APC states that its FAST system uses a combination of theoretical interference and measured data analyses to determine channels that can be used without interference to microwave incumbents. According to APC, its system dynamically adjusts to a changing radio frequency environment. APC argues that the advanced techniques it developed to manage interference both within PCS systems and to and from incumbent microwave users cannot legitimately be described as simply traditional frequency management.[26] Further, APC states that Bell Atlantic's claim that frequency sharing techniques such as FAST will not be needed because the 2 GHz band will be cleared of incumbents fails to consider the transition plan adopted by the Commission in ET Docket No. 92-9.[27]

21. In response to GTE's arguments, APC notes that GTE opposes all of the preference requests and argues that in opposing APC's request GTE merely is adhering to its view that no party merits a preference regardless of the significance of its accomplishments. APC concludes that GTE's comments ignore the full scope of APC's efforts, provide no new evidence or arguments, and should not receive serious consideration.

22. We conclude that FAST is more than an existing frequency management scheme combined with a CT-2 allocation technique; that it permits PCS to be implemented in the same band as microwave users, and permits PCS to share licensed spectrum with these incumbents by utilizing unused frequencies. We do not agree that FAST is similar to PCNA's proposal. The system proposed by PCNA relied upon a completely different overlay technology. We also disagree with GTE that licensing ACSB systems on interstitial land mobile channels is similar or relevant to considering the innovativeness of FAST. The technical problems of designing for spectrum sharing between unlike systems such as fixed microwave and mobile PCS necessarily are substantially different from merely coordinating the frequency use of systems that are in the same service and therefore have a substantial set of similar characteristics. Further, the integration of CT-2 elements such as the call set-up procedure utilized by APC does not detract from this technology; it is only one part of APC's complete system. APC's system provides substantial additional interference protection to both PCS and microwave operations.

23. PCNA, Southwestern Bell Personal Communications, Inc. (SBPC), Personal Communications Network Services of New York, Inc. (PCNS-NY), and Associated PCN Company (Associated) argue that APC has not met the standard for a preference award. PCNA states that its efforts -- and not APC's -- led to consideration of 2 GHz spectrum for PCS. According to PCNA, its petition initiated Commission consideration of PCS.[28] SBPC states that the 1850-1990 MHz band already was under international consideration for PCS; therefore, APC should not be credited with focusing attention on this band. Further, SBPC argues that APC's analysis of unused spectrum in the 2 GHz band is flawed because it did not include co-channel and adjacent channel exclusion zones in the vicinity of the microwave transmitters. SBPC asserts that had APC's study considered these aspects, significantly less spectrum would have been identified as available for PCS. Additionally, SBPC argues that the FAST concept was not revealed until October 28, 1991 -- more than three months after SBPC disclosed the details of its Intelligent Multiple Access Spectrum Sharing (IMASS) system.[29] PCNS-NY states that in its pioneer's preference request filed on July 30, 1991 it originated the proposals governing relocation of existing 2 GHz fixed microwave users that the Commission credits to APC.[30]

24. Associated states that it preceded APC with respect to both the proposal of a frequency-agile sharing technology and field testing of this technology.[31] Associated states that it proposed a frequency agile spectrum sharing technology in its experimental PCS license dated August 17, 1990, whereas APC's first mention of the FAST concept was in its Fifth Quarterly Report submitted in October 1991. Associated states that it conducted the first field tests of its spectrum sharing technology in early October 1991, whereas APC's first testing of the FAST concept occurred in April 1992.

25. With respect to the arguments of PCNA, APC responds that the raw and unanalyzed data supplied by PCNA significantly differs from the detailed and exhaustive analyses contained in APC's July 1991 FAST Report. APC further notes that PCNA's approach is an overlay scheme that would require PCS systems to use the same frequencies as the POFS systems, whereas APC's approach is a frequency agile avoidance system that permits PCS systems to utilize unused POFS spectrum.

26. With respect to the arguments of SBPC, APC responds that its July 1991 FAST Report quantified PCS spectrum availability in the 1850-1990 MHz band utilizing sound engineering criteria for spectrum sharing.[32] APC states that its spectrum sharing study was updated in Au-

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[24] *See* Bell Atlantic at 6-13 (January 29, 1993).
[25] *See* GTE at 6-11 (January 29, 1993).
[26] *See* APC Reply at 5-7 and Attachment A of the Reply at 17-18 (March 1, 1993).
[27] *See* Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992) and *Third Report and Order and Memorandum Opinion and Order*, ET Docket No. 92-9, 8 FCC Rcd 6589 (1993), *recon. pending*.
[28] *See* PCNA at 25-27 (January 28, 1993).
[29] *See* SBPC at 8-13 (January 29, 1993).
[30] *See* PCNS-NY at 9-12 (January 29, 1993).
[31] *See* Associated at 6-8, 25-37, 40-47 (January 29, 1993).
[32] *See* APC Reply at 7-9 and Appendix A of the Reply at 43-49 (March 1, 1993).

gust 1991 to include co-channel and adjacent channel exclusion zones in the vicinity of microwave transmitters and that its original conclusions were affirmed.[33] APC contends that, in contrast, as late as December 17, 1992 SBPC was still unwilling to quantify PCS spectrum availability or even commit to the feasibility of spectrum sharing.[34] Additionally, APC states that FAST was designed to work in a highly congested microwave environment. Finally, APC states that it initiated its approach to spectrum sharing in March 1990 and first publicly disclosed it in May 1990. APC states that it has been making systematic measurements of the 1850-1990 MHz band since April 1991, when it initiated tests of its first transmitter, whereas SBPC first disclosed the IMASS concept in its July 16, 1991 application for experimental authorization.

27. With respect to the arguments of PCNS-NY, APC responds that APC's approach to sharing spectrum with some microwave licensees and relocating others forms the basis for the transition plan adopted by the Commission in ET Docket No. 0 92-9.[35] By contrast, APC notes that PCNS-NY's approach is not to share the band, but to clear it entirely of existing users.

28. With respect to the arguments of Associated, APC responds that Associated's proposals are not the same as FAST.[36] APC argues that the entire scope of Associated's developmental activity lies in its attempt to develop a cellular-style hand-off technique for PCS under the rubric of frequency hopping. Additionally, APC argues that Associated's proposal addresses only fixed microwave to PCS interference protection, and that Associated failed to consider PCS to fixed microwave interference. Further, APC reiterates that unlike its own frequency avoidance scheme, Associated's proposal is an overlay scheme. Finally, APC states that Associated has not field tested an operating PCS system to demonstrate that its proposals will lead to an interference-free, high capacity PCS system.

29. As we noted in the *Tentative Decision*, while APC was not the first to suggest the 1850-1990 MHz band for PCS, APC's studies focused attention on sharing this band.[37] APC's study was the first to demonstrate the feasibility of initiating PCS operations in this band without first relocating the existing fixed microwave operations. In addition, as set forth by APC, its analysis considered co-channel and adjacent channel interference. Finally, APC clearly stated its intention to geographically share spectrum with POFS stations in its May 3, 1990 application for an experimental license. In the Engineering Exhibit thereto APC stated that it "intends to select microcell locations so as to avoid inter-system co-channel and semi-adjacent channel interference."[38] Additionally, it stated that "[a]ll APC portable units can be prevented from operating in the areas of potential interference near the receive antennas of existing co-channel licensees by the careful location of base stations."[39] Accordingly, to the extent that timing is an issue, the record demonstrates that APC's intentions were revealed before SBPC's disclosure of its IMASS proposal.

30. With respect to the arguments of Associated and PCNA, both parties proposed frequency overlay schemes. We find that such experiments are technically different from a frequency avoidance scheme such as FAST, and therefore there is no need to consider further the requesters' filing timetables. With respect to PCNS-NY, we find that APC proposed a strategy of sharing spectrum with microwave users and relocating some microwave users -- with full cost reimbursement, and only to reliable alternative frequencies -- in its October 1, 1990 comments to the PCS *Notice of Inquiry*[40] and again in its May 4, 1991 filing in this docket.)[41]

31. Corporate Technology Partners (CTP) argues that APC has not developed the capabilities or possibilities of a given technology such as narrow channel CDMA. Instead, CTP argues that APC has developed a way that existing technology, through base station siting and propagation analysis, can be used in "gaps" between the fixed microwave transmission paths. CTP submits that it has done far more than APC to adapt base technologies for frequency sharing. Further, CTP states that APC's claim that it developed its FAST concept in March 1990 lacks credibility. CTP notes that in APC's May 1990 experimental license application, APC states that its "proposed CDMA system experiment is not designed to test... interference issues." Moreover, CTP alleges that there is substantial evidence that essential elements of FAST were derived specifically from CTP's prior Interference Sensing Code Division Multiple Access (ISCDMA) work.[42]

32. APC responds that it developed the FAST approach to spectrum sharing and that FAST clearly is distinguishable from CTP's ISCDMA.[43] APC argues that a major way in which FAST differs from CTP's proposal is that FAST has been proven to work in practice through on-the-air demonstration, whereas CTP's approach has not been proven on paper, much less field-tested. APC asserts that the sole technical paper on which CTP relies for the viability of its proposal concludes that "further work is needed" to test the proposal's "reliability in an actual PCS environment."[44] APC also states that CTP's proposal would not effectively protect incumbent microwave users because CTP's system only "senses" interference at initial call set-up and does not continuously monitor and adjust the operating frequency. Additionally, APC states that CTP's proposal would not protect receive-only systems and systems that do not utilize an 80 megahertz transmit-receive separation. Finally, APC states that in its May 3, 1990 application for experimental license it disclosed that its experiment was based on frequency avoidance techniques

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[33] With the addition of the co-channel and adjacent channel transmitter exclusion zones, the number of grid point locations with at least 50 megahertz of spectrum available for PCS dropped from 96.3% to 95.7% in the top 11 markets.

[34] *Citing* SBPC's Quarterly Report Number Three.

[35] *See* APC Reply at 15-16 (March 1, 1993).

[36] *See* APC Reply at 11-12 and Appendix A of the Reply at 1-16 (March 1, 1993).

[37] *See Tentative Decision, supra* note 8, 7 FCC Rcd at 7797.

[38] *See* APC's Application for Experimental Radio Service License, 1447-EX-PL-9, at page 6 of the Engineering Exhibit.

[39] *Id.* at 8.

[40] *See Notice of Inquiry*, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990).

[41] *See* APC's Petition for Rulemaking at 17.

[42] *See* CTP at 24-38 (January 29, 1993).

[43] *See* APC Reply at 16-25 and Appendix A of the Reply at 19-40 (March 1, 1993).

[44] *See* CTP, Exhibit G at 21 (January 27, 1993).

and designed to test interference issues; and that the statement that CTP quotes refers specifically to PCNA's overlay approach, not APC's avoidance approach.

33. We conclude that APC's FAST is significantly different from CTP's ISCDMA, particularly in that it continues to monitor the channel and can adjust frequency after call set up. We also concur with APC that the technical feasibility of FAST has been demonstrated through an experiment.

34. In the *Pioneer's Preference Report and Order*, we stated that "proposals that promise to enable the sharing, or co-use, of allocated spectrum may qualify" for a preference.[45] The major challenge that we faced in this proceeding was to design a specific, comprehensive plan to provide spectrum for PCS. We conclude that APC's development and demonstration of technologies that facilitate spectrum sharing by PCS and microwave systems at 2 GHz is a significant communications innovation of the sort the Commission established the pioneer's preference rules to recognize and that APC meets the criteria established by those rules for a preference. This conclusion is based upon two factors: APC's demonstration of unused spectrum, and APC's system that permits using this spectrum to initiate PCS.

35. APC's analysis and testing demonstrated that unused spectrum exists in the 1850-1990 MHz band sufficient to allow immediate initiation of PCS services with no need to immediately relocate existing licensees. APC's July 1991 FAST Report that convincingly demonstrated the existence of this spectrum changed the focus of attention from relocating the existing licensees to frequency sharing. This study, and the transition plan presented in APC's petition for rule making, have elements in common with the transition plan we adopted in ET Docket No. 92-9 to facilitate making available 2 GHz spectrum for emerging technologies, including PCS. Further, we conclude that APC demonstrated that its FAST technology is significantly different from that proposed by other 2 GHz PCS applicants, constitutes more than traditional frequency management techniques, and that APC has demonstrated its technical feasibility. In sum, APC has demonstrated that FAST provides the means of accomplishing a graceful transition from a fixed service environment to a shared fixed and mobile services environment.

36. For the above reasons, we find that APC has demonstrated that its FAST technology is innovative, spectrum efficient, and technically feasible. Its proposal builds on prior developments and brings them to a significantly more advanced and effective state, combining new and existing technologies and utilizing them as the basis for a complete system to provide PCS services on spectrum shared with existing fixed microwave operations. APC has demonstrated the technical feasibility of its proposal, including the underlying technology upon which it relies. Additionally, we find that APC has demonstrated that it developed an innovative proposal that will lead to the establishment of a new service within the PCS family. Finally, we find that the rules we have adopted are a reasonable outgrowth of APC's proposal and lend themselves to a grant of a preference to APC. The PCS service rules adopted earlier in this proceeding and the transition plan adopted in the emerging technologies proceeding.[46] both reflect APC's spectrum sharing study and related submissions. Specifically, our allocation of the 1850-1970 MHz, 2130-2150 MHz, and 2180-2200 MHz bands for licensed and unlicensed PCS on a shared basis with existing fixed, microwave licensees reflects several APC studies and proposals.[47] Further, our licensing of PCS on an MTA basis reflects a proposal made by APC.[48] Accordingly, we award APC a pioneer's preference.

37. *Cox Enterprises, Inc. (PP-52).* Cox requests a pioneer's preference for its having developed and demonstrated the feasibility of using cable facilities to provide backbone communications linking PCS microcells; and for its development of the equipment that permits this use. Cox states that it has pioneered advancements essential to the realization of PCS, including the development of equipment (a "cable microcell integrator" (CMI)) that is a critical component of the cable-PCS infrastructure that it envisions.[49] The CMI is an interface, developed under a joint contract with Scientific-Atlanta, that connects individual PCS communications to multiple types of cable television distribution systems.[50]

38. Cox states that in its experimental license application submitted on September 20, 1990, it was the first to propose three specific design criteria central to the introduction of PCS using cable facilities: 1) cable distribution plant as the backbone for a PCS network; 2) centralized instead of distributed modulation; and 3) distributed antennas.[51] Cox now states that it has demonstrated the feasibility of all three criteria. It contends that using cable as PCS backbone facilitates the delivery of PCS to the public quickly and in a spectrum efficient manner. Further, Cox states that centralizing modulation, which entails placing expensive modulation equipment at centralized locations such as cable headends, lowers the overall cost of deploying PCS because of the lower equipment costs for each microcell. Finally, Cox contends that using distributed antennas, which are small, inexpensive, passive antennas that relay the received signals to a central location, lowers the cost of equipment at microcell locations and increases cell coverage areas.

39. On February 12, 1992, Cox employed cable plant to carry a PCS phone call over an operating cable system. To accomplish this, Cox developed, tested, and used its CMI that receives radio voice channels and modulates and multiplexes the channels onto the cable plant. Cox claims that its equipment permits acquiring a 1.544 megabit per second channel using existing cable plant. The signals can be sent in either direction over the cable plant (to the cable headend or to a PCS microcell), and downconverted to voice channels. According to Cox, its microcell is suitable for placement in the outside pole-mounted cable plant, and includes both a transmitter/receiver and antenna integrated with the CMI. Cox states that this equipment can be used in fiber, copper, or hybrid fiber/copper cable distribution systems.

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[45] *See* note 2 *supra*, 6 FCC Rcd at 3492.

[46] *See* note 27, *supra*.

[47] *See* note 20, *supra*, and APC's Request for Separate and Expedited Treatment of "Existing Pioneer Preference" Issues, at note 8 (October 28, 1993).

[48] *See* APC's Supplement to Petition for Rule Making at 27-34 (May 4, 1992).

[49] *See* Cox Pioneer's Preference Request at 21 (May 4, 1992).

[50] *Id.* at 10.

[51] *Id.* at 4.

40. Cox states that in March 1992 it successfully demonstrated cell-to-cell handoff using an operating cable system to connect microcells operating with 2 GHz equipment. SCS Mobilecom, Inc.'s (SCSM's) broadband 1850-1990 MHz equipment was used to communicate between two cells connected to the cable headend. As the mobile handset moved between cells it received signals from both until the handset signaled the headend and cell base stations to switch to the stronger signal.[52]

41. Cox also states that it successfully demonstrated operation of centralized modulation during the March 1992 tests. As explained by Cox, a 2 GHz CDMA signal was received, converted to an intermediate frequency, and transmitted over cable plant to a headend. At the headend the signal was demodulated and connected into the public switched telephone network (PSTN). This, Cox claims, demonstrated the feasibility of centrally locating modulation electronics at the headend and deploying smaller, less expensive equipment at microcells to lower network costs by sharing equipment.[53]

42. Responding to Cox's preference request, CTP acknowledges that Cox has performed significant work on a fiber optic-PCS interface, but states that Cox has not addressed PCS radio technology.[54] GTE argues that Cox's efforts are similar to other experiments, and therefore are not innovative or pioneering.[55]

43. Pacific Telesis Group (PacTel) argues that Cox's proposal to adapt its cable infrastructure to PCS does not merit a preference because Cox's demonstration of an actual call could have been made using any one of a number of current systems being tested. Additionally, PacTel contends that Cox does not address spectrum sharing at 2 GHz.[56] Viacom International, Inc. (Viacom), while not disagreeing that Cox warrants a preference, states that it is the only cable entity that addresses sharing 2 GHz spectrum with incumbent microwave users.[57]

44. In response to CTP, Cox argues that it tested radio technology by conducting propagation and over-the-air tests with 902-928 MHz and 1.8 GHz equipment, and that this constitutes development of radio-based service. Further, Cox argues that objections based on the development of radio equipment would limit preference awards to equipment manufacturers.[58] In response to PacTel, Cox argues that it addressed spectrum sharing issues in its filings in the PCS proceeding; and that in any event, although spectrum sharing proposals are eligible for pioneer's consideration, the Commission has never implied that spectrum sharing is an essential or necessary component of a preference showing.[59]

45. We concur with Cox that it has addressed appropriately PCS radio technology and spectrum sharing issues in its filings. In the *Tentative Decision* we proposed to award Cox a pioneer's preference for its proposal to use the cable television plant for connecting PCS microcells and its subsequent development and demonstration of equipment capable of interfacing PCS microcells with copper, fiber, and hybrid copper/fiber cable plant.

46. In response to the *Tentative Decision*, Nextel Communications, Inc. (Nextel), PCNA, Tel/Logic, Inc. (Tel/Logic), and Viacom express support for granting Cox a pioneer's preference. Additionally, Cablevision Systems Corporation (Cablevision) and Time Warner Telecommunications, Inc. (Time Warner) explicitly do not object to a preference grant to Cox, although each contends that its own proposal is equally or more deserving of a preference.

47. However, Cable USA, Inc. (Cable USA), CTP, Pacific Bell, and Satcom, Inc. (Satcom) contend that Cox should not be granted a preference. These parties argue that Cox was not the first entity to propose using cable television plant to provide PCS and that Cox otherwise does not meet the pioneer's preference criteria.[60] Cable USA, CTP, PacTel, and GTE all take issue with our conclusion that Cox's request demonstrates innovation. Cable USA claims that Cox tested the same equipment that Rogers Cantel (Rogers) had previously tested in Canada. Pacific Bell states that Manitoba Telephone Service demonstrated the use of cable plant to carry telephone signals in the 1980's.[61] GTE submits that Cox's demonstration used Omnipoint equipment designed to operate in the 902-928 MHz band and therefore should not be attributed to Cox nor considered for a 2 GHz award; and that the CMI was designed by Scientific-Atlanta and appears to be no more than a modulator/demodulator transmitting and receiving voice over a fiber optic cable. GTE also asserts that Cox's distributed antenna/remote antenna driver (RAD) technology was developed in Canada. Finally, CTP states that Tele-Communications, Inc. (TCI) has been carrying phone calls for the military over cable systems for many years.

48. In reply, Cox states that the equipment tested in Canada proved inadequate to meet Cox's requirement for a full-featured PCS system. Cox states that the CT-2 type service tested by Rogers could provide overlapping coverage areas but not call handoff.[62] Further, Cox maintains that the Rogers system connected directly to the PSTN and had no independent switching capabilities. Cox states that from early discussions with potential PCS equipment suppliers it concluded that linking microcells by two-way cable TV systems had not been considered, and that suppliers were focusing on radio technology for the backhaul. Cox asserts that it tested cable and fiber backhaul, both broadband and narrowband, and that readily available modems could not support testing multi-backhaul configurations and multi-PCS links. Therefore, in June 1991 Cox states that it approached Scientific-Atlanta with the CMI concept to provide flexibility for network reconfiguration and connection to various types of PCS radio equipment.[63]

49. We conclude that although CT-2/Cable TV tests were conducted in Canada, Cox was the first to propose using cable for backbone purposes and begin testing actual equip-

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[52] *See* Cox Report at 3 (June 25, 1992).
[53] *Id.* at 2.
[54] *See* CTP at 1 (June 10, 1992).
[55] *See* GTE at 16 (June 10, 1992).
[56] *See* PacTel at 26 (June 10, 1992).
[57] *See* Viacom at 3 (June 10, 1992).
[58] *See* Cox Reply at 4 (June 25, 1992).
[59] *Id.* at 8.
[60] *See* Cable USA at 6-7, CTP at 19-20, Pacific Bell at 15, and Satcom at 6 (January 29, 1993).
[61] *See* Pacific Bell at 15 (January 29, 1993).
[62] *See* Cox Reply at 32 (March 1, 1993).
[63] *Id.* at Exhibit D, 5-7.

ment to demonstrate whether or not the theoretical synergies of PCS and cable systems could be realized through a cost-effective integration of aspects of both networks. We further find that Cox did not merely copy other CT-2/Cable tests having limited capabilities, but rather designed, developed, and tested multi-backhaul configurations and multi-radio PCS systems that incorporated hand-off capability, centralized modulation, and distributed antenna configurations. These capabilities were realized through its design and development work and brought to fruition by the CMI it developed in conjunction with Scientific-Atlanta.[64]

50. Cox has demonstrated the technical feasibility of its concepts by, among other things, initiating a phone call over its system and interfacing PCS microcells with copper, fiber, and hybrid copper/fiber cable plant. Using the existing cable plant in PCS network design permits economical and rapid deployment of PCS systems and substitution of existing infrastructure for increasingly scarce spectrum. Cox has demonstrated that it has "developed the capabilities or possibilities of the technology or service" and has "brought them to a more advanced or effective state"[65] as required by our rules by developing and demonstrating the cable/PCS interface equipment. The efforts of Cox advanced PCS system design by demonstrating the feasibility of integrating cable networks with full-featured PCS systems to offer a spectrum efficient service in a timely, cost effective manner. Finally, the rules adopted in the *Second Report and Order* are a reasonable outgrowth of Cox's proposal and reflect Cox's experimental cable/PCS efforts in the 1850-1990 MHz band. We note that the PCS *Second Report and Order* declined to allocate PCS support spectrum, as proposed by several parties, because "many of these support operations can be provided through facilities such as fiber optics, wireline telephone services and coaxial cable, that do not require use of radio."[66] Cox's early efforts in demonstrating how cable facilities can be used in place of additional spectrum to connect PCS microcells was an important component of this decision. Accordingly, we award Cox a pioneer's preference.

51. *Omnipoint Communications, Inc. (PP-58).* Omnipoint requests a pioneer's preference for its design, development, miniaturization, and deployment of the first 1850-2200 MHz handheld phone. Its equipment utilizes spread spectrum technology with associated CDMA, TDD, and frequency division multiple access (FDMA). Omnipoint claims that its spread spectrum equipment can provide a variety of voice, data, and video services using microcell technology. Omnipoint's equipment was designed to be independent of a specific network architecture and therefore can be used with systems such as Advanced Intelligent Network (AIN), cable television, private branch exchanges (PBXs), and Centrex. Omnipoint claims that the design of its equipment results in less interference to incumbent microwave operations than that of other proposed PCS equipment, and that this permits greater spectrum sharing. Omnipoint's handsets can switch from licensed PCS bands at 2 GHz to unlicensed frequencies at 2.4 GHz. Omnipoint proposes a Common Air Interface (CAI) that will permit its mobile equipment to operate with different network topologies (including one-way, two-way, PSTN, Central Office based networking, AIN, and cable television).

52. Omnipoint contends that operation of its proposed PCS equipment can coexist with other users and fixed microwave operations on the same frequencies with minimum disruption and maximum flexibility. Omnipoint states that these attributes derive from utilizing spread spectrum for its phone instruments, which allows for exclusion zones around microwave towers that are 10 to 100 times smaller than the exclusion zones of equally-powered narrowband systems. Omnipoint argues that other CDMA systems have multiple users transmitting on the same frequency at the same time, which increases the level of interference, while its system is distinguished by its use of TDD to separate users in time. According to Omnipoint, only one unit is transmitting at any one time on a channel, and therefore the unit can operate at lower power and cause less interference. Omnipoint also states that its system has less potential of interfering with microwave operations than a narrowband CDMA system because its system spreads its transmission across 5 or 10 megahertz. Additionally, Omnipoint says that its TDD equipment allows the user to transmit and receive on one 5 or 10 megahertz channel and that its equipment is frequency agile. Omnipoint asserts that using 10 megahertz channels permits its system to match the fixed microwave channelization scheme and the frequency agility permits the system to minimize interference by utilizing unused spectrum.

53. Omnipoint maintains that its coding scheme permits using high data rates per frequency channel and to separate users within a cell by time. Omnipoint states that its system uses frequency offsets and codes to separate cells and that it can operate at a frequency reuse factor of three, or with a frequency reuse factor of one with less capacity. Omnipoint states that its system has flexibility in the number of time slots per user per second used, which permits flexibility in the number of simultaneous users and types of service. Specifically, it says that its TDD technology allows voice and data transmissions on the same frequency. Omnipoint asserts that it does not require precision adjustable power control and continuous soft handoff because its system does not overlay multiple users on the same frequency at the same time, which it contends gives it an advantage over CDMA-only systems.[67]

54. Omnipoint states that its handsets can switch between the proposed PCS band at 1850-1990 MHz to the existing unlicensed spread spectrum band at 2400-2485 MHz. According to Omnipoint, this capability allows the user to access a base station using unlicensed frequencies while at home or in the office, and to access the PCS network when away from the base station.

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[64] Both Cox and Scientific-Atlanta appear to have played key roles in developing the CMI, but apparently under the direction of Cox. As detailed herein, Cox also performed substantial additional work in demonstrating the feasibility of using cable facilities to provide PCS, and in this proceeding Scientific-Atlanta does not dispute Cox's responsibility for the CMI.

[65] *See* 47 C.F.R. § 1.402(a).

[66] *See Second Report and Order*, note 10 *supra*, 8 FCC Rcd at 7741.

[67] Omnipoint states that soft handoff, which permits a mobile to communicate on one frequency to multiple cells at the same time, reduces capacity, and that automatic power control is an added expense.

55. In the *Tentative Decision* we proposed to award Omnipoint a preference for having developed 2 GHz equipment that utilizes innovative techniques that may facilitate the development and implementation of PCS services and technologies. We acknowledged Omnipoint's efforts in the areas of: 1) radio frequency engineering and related spread spectrum product design, development, miniaturization, and deployment of equipment; 2) system architecture that facilitates coexistence with other users of the same frequencies; and 3) design and development of a base station interface that is compatible with advanced features of the PSTN.

56. We were persuaded that Omnipoint merited a tentative preference because it was the first to produce practical, working 2 GHz equipment for PCS. Omnipoint's equipment uses direct sequence spread spectrum access techniques in a 5 or 10 megahertz channel.[68] We recognized that there likely will be a number of equipment designs for PCS, some of them significantly different from that developed by Omnipoint in terms of access technique, bandwidth, or size. Nevertheless, we found that the original work of Omnipoint had contributed significantly to the development and testing of PCS services and design concepts.

57. We also stated that the concepts and technological developments pioneered by Omnipoint will facilitate the implementation of PCS in the 2 GHz band and permit sharing with fixed microwave licensees. We tentatively concluded that Omnipoint's design, development, manufacture, and demonstration of spectrum-efficient innovative concepts as set forth in its request for pioneer's preference and its experimental file demonstrate the feasibility of its concepts.

58. In comments to the *Tentative Decision* GTE argues that Omnipoint did not develop its spread spectrum equipment for PCS systems, but rather used the PCS proceeding to translate its technology development into a spectrum authorization.[69] Similarly, GTE and PageMart, Inc. (PageMart) assert that the Commission previously determined that equipment manufacturers generally should not be eligible for a preference unless their technology is linked to a specific service, and according to GTE, Omnipoint's handsets were not developed in association with a licensable service, but rather were developed for unlicensed operations in the Industrial, Scientific, and Medical (ISM) bands (902-928 MHz and 2.4-2.4835 GHz).[70] GTE also asserts that Omnipoint initiated development of its spread spectrum products four years before the May 1991 release of the *Pioneer's Preference Report and Order* and should not be awarded a pioneer's preference for past innovation.

59. In response to GTE, Omnipoint states that it drew from previous experiences to design a system specifically for PCS and made substantial innovations specifically related to PCS. It contends that while it has been involved with spread spectrum research for some time, it has spent millions of dollars to bring to fruition its PCS innovations, and that these efforts were spurred by the Commission's adoption of the pioneer's preference rules. Omnipoint also argues that GTE's timing arguments have no legal basis because there is no Commission requirement that a pioneer conduct its entire work within any specific time.[71] Regarding GTE's and PageMart's assertions that the preference rules do not extend to innovative technology or equipment development but only to service innovators, Omnipoint responds that its equipment facilitates an innovative service, and that creating a dichotomy between technology and service misconstrues the Commission's pioneer's preference rules.[72]

60. We conclude that Omnipoint has demonstrated that its PCS equipment uses innovative technology that relates specifically to provision of PCS at 2 GHz. Omnipoint has demonstrated the capability of its equipment and has developed a flexible technology that other entities can implement in establishing their PCS systems. We disagree with GTE's argument that Omnipoint's equipment is not associated with a licensable service. Omnipoint as well as other experimental licensees that have used Omnipoint's equipment have demonstrated that Omnipoint's equipment may be used in either a licensed or unlicensed service. Further, the use of dual mode phones that permit the use of unlicensed frequencies while in business or residential environments and licensed PCS frequencies in public or mobile environments is itself a potential benefit by making efficient use of the available spectrum and providing for equipment use without airtime charges. Further, we disagree with GTE's arguments concerning the timing of Omnipoint's developments relative to our establishment of pioneer's preference rules. Omnipoint has demonstrated that it performed significant new work related to 2 GHz PCS after adoption of the pioneer's preference rules.

61. GTE further contends that the Commission failed to explain why Omnipoint's request should receive a preference in light of deficiencies identified in Omnipoint's two other requests.[73] GTE argues that the Commission's tentative denials of these two requests is inconsistent with the tentative approval of this request because the three filings use the same basic architecture and equipment.

62. Omnipoint replies that the pioneer's preference rules do not provide for a grant to all who use the same technology, but only to those who innovate and do significant work with the technology that leads to a service. Omnipoint asserts that its tentative award, PP-58, should not be linked with the tentatively denied requests, PP-59 and PP-60, because there are obvious fundamental differences among the three proposals. For one, Omnipoint argues that each proposal dealt with a completely different service concept.

63. We conclude that there are substantial differences between Omnipoint's request in PP-58 and the two requests that we tentatively denied. In PP-59 Omnipoint, Oracle, and McCaw proposed a data broadcast service, and in PP-60 Omnipoint Mobile Data Company proposed two-way data communications to mobile devices such as porta-

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[68] *See* Omnipoint's Semi-Annual Experimental License Progress Report, August 1993, at 7.

[69] *See* GTE at 15-18 (January 29, 1993).

[70] *Id.* at 15; *see also* PageMart at 4-5 (January 29, 1993).

[71] *See* Omnipoint Reply at 17 (March 2, 1993).

[72] Omnipoint argues that its work will lead to the establishment of low cost, wireline quality voice, data, and video services, delivered wirelessly, to pocket-size devices, for use in public and private environments, with a minimum of disruption to fixed microwave users.

[73] Omnipoint filed a pioneer's preference request jointly with Oracle Data Publishing, Inc. and McCaw Cellular Communications, Inc. (PP-59); and Omnipoint Mobile Data Company also filed a preference request (PP-60).

ble computers. We proposed to deny the requests in both PP-59 and PP-60 because the applicants did not demonstrate successfully the technical feasibility of their proposals, or their specific responsibilities for development of identifiable and innovative PCS technologies or services. By contrast, in PP-58 Omnipoint requests a preference for developing 2 GHz spread spectrum equipment that it demonstrated to be capable of being used to provide voice, data, and PCS video services. Omnipoint also demonstrated on the record its responsibility for specific identifiable innovations, as discussed above.

64. Bell Atlantic also disagrees with our tentative approval of Omnipoint's request, stating that Omnipoint's system is based on well-known spread spectrum techniques that have been used in both military and commercial equipment for over twenty years.[74] Therefore, Bell Atlantic argues, neither the concept nor the demonstration of operation at 2 GHz by Omnipoint is innovative. Bell Atlantic adds that SCSM, Digital Spread Spectrum Technologies, Inc. (DSST), and Qualcomm also manufacture 2 GHz CDMA equipment. Bell Atlantic also argues that European companies have designed TDMA PCS systems in the 2 GHz range, and further claims that Omnipoint's TDD/CDMA/FDD is a compilation of existing technologies. Finally, Bell Atlantic asserts that Omnipoint's request lacks substantial field or experimental data to demonstrate operational multicell feasibility.

65. Regarding Bell Atlantic's comments that Omnipoint's equipment is based on well-known spread spectrum techniques, Omnipoint asserts that the spread spectrum technologies and military projects to which Bell Atlantic refers are completely different from its technology. Omnipoint states that its engineers worked on each of the military projects mentioned by Bell Atlantic and that this did provide experience with spread spectrum technology, but that none of these military projects form the basis for a PCS system.[75] Omnipoint asserts that some of the differences are that the military equipment is much heavier than PCS equipment, is not duplex, uses frequency hopping rather than direct sequence techniques, and is high power. Omnipoint also asserts that Bell Atlantic glosses over the significant differences between its system and those of SCSM, Qualcomm, and DSST. Omnipoint claims that it was the first to miniaturize its phone and that it is responsible for integrating TDD with CDMA.

66. Concerning Bell Atlantic's assertion that Omnipoint has not demonstrated an operational system, Omnipoint asserts that several other parties in this proceeding use Omnipoint's equipment and that this demonstrates its technical feasibility. Further, Omnipoint maintains that it has fully demonstrated the systems's operation itself.[76]

67. Based on the record, we conclude that Omnipoint's equipment is innovative and substantially different from that of SCSM, DSST, Qualcomm, and the various military projects for which Omnipoint also developed equipment. We are not aware of any other entity proposing or building 2 GHz PCS equipment that allows for both transmit and receive on the same frequency channel (TDD) and multiple users on the same frequency channel (TDMA) while also providing for multiple cells on the same frequency channel by using spread spectrum and associated CDMA technology or by using different frequency channels (FDMA) with CDMA. This combination of FDMA and CDMA is used to provide diversity from one channel to the next. We are not convinced that developments in any of the mentioned military projects are capable of being used for pocket phone PCS. Additionally, we believe that not only has Omnipoint demonstrated the feasibility of multicell operations, but that other entities have used Omnipoint's equipment in various configurations that support our finding of feasibility.

68. Pacific Bell concedes that Omnipoint has made significant contributions to PCS, but argues that Omnipoint's proposed system is inferior to that developed by Pacific Bell.[77] Pacific Bell contends that Bell Atlantic tested both Omnipoint's and Pacific Bell's equipment and the results indicated that Pacific Bell has more sensitive receivers and that its TDMA technology has twice the coverage area and could operate at lower transmitter power.

69. In response to Pacific Bell, Omnipoint states that Pacific Bell's own data do not support its claims when subjected to the same analysis as Omnipoint's system. Additionally, Omnipoint asserts that the test upon which Pacific Bell relies was but one of many at this site, that the site was chosen because of its unusual propagation properties, and further, that Omnipoint's equipment used for the particular test in question contained experimental aspects not part of its current design.[78] We conclude that the record does not support Pacific Bell's claim.

70. Qualcomm claims that Omnipoint has not filed the results of an experiment or tests that validate the performance of its system.[79] Qualcomm also claims that Omnipoint failed to provide a detailed description of its system. It further argues that Omnipoint's interference to microwave facilities analysis is flawed and that a proper analysis would show that there is no significant difference in exclusion zone radius between Omnipoint's system and a narrowband system. Qualcomm states that Omnipoint erred by using average, rather than peak, powers in its calculations of interference to microwave operations, and argues that if Omnipoint's system transmitted the same number of speech bits over the same channel using the same antenna as a CT-2 system, its average power would be comparable to that of the CT-2 system.

71. Qualcomm also asserts that many technical details were omitted from Omnipoint's material, but that given the parameters provided, it appears that Omnipoint's system can provide only eight calls in each cell, using 10 megahertz of spectrum. Qualcomm further maintains that Omnipoint has not developed a working system and therefore would have to use a third party's equipment in order to capitalize on its pioneer's preference.[80]

72. Omnipoint responds that it has demonstrated a functional system, and provides statements from Ameritech, American Portable Telecommunications, Inc. (APT), Cox, SBPC, and Time Warner that each have tested Omnipoint's system. With respect to Qualcomm's assertion that Omnipoint's system cannot coexist with microwave oper-

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[74] *See* Bell Atlantic at 13 (January 29, 1993).
[75] *Id.* at 21.5
[76] *Id.* at 23.
[77] *See* Pacific Bell at 12 (January 29, 1993).
[78] *Id.* at Appendix 1.
[79] *See* Qualcomm at 19 (January 29, 1993).
[80] *Id.* at 24.

ations, Omnipoint replies that experiments with SBPC disprove this claim.[81] Further, Omnipoint maintains that Qualcomm's assertion that Omnipoint uses average power in its interference analysis is incorrect. Omnipoint states that peak power is used in all of the calculations and coexistence tests.

73. We find no basis to question Omnipoint's interference analysis. Additionally, Omnipoint has demonstrated the technical feasibility of its system. Finally, we do not agree with Qualcomm's assertion that a preference applicant must use only its own equipment for a complete system.

74. Accordingly, we conclude that Omnipoint meets the standard specified in our rules for grant of a pioneer's preference. Omnipoint has demonstrated its role in developing PCS by designing and manufacturing innovative spread spectrum/time division equipment. Omnipoint's handsets also have enabled other entities to develop PCS experimental systems, thereby facilitating experimentation and establishment of this new service. Omnipoint also has proposed a viable service with the flexibility to be implemented in a variety of environments and with capabilities useful to subscribers. Two of these capabilities are the flexibility in assigning time slots to mobile units so that long data messages can be transmitted in a short time, and the ability to switch from licensed PCS frequencies to unlicensed frequencies, thereby permitting subscribers to use the handsets in residential or office environments in a manner similar to that of a cordless telephone. Finally, the rules we are adopting are a reasonable outgrowth of Omnipoint's proposal and reflect Omnipoint's development of equipment in the 1850-1990 MHz band. The technical standards adopted in the PCS *Second Report and Order* are consistent with experiments performed by Omnipoint and those of several other parties using Omnipoint's equipment. Accordingly, we award Omnipoint a pioneer's preference.

License Block

75. In the *Second Report and Order* the Commission allocated seven blocks of spectrum for licensed PCS encompassing 120 megahertz at 1850-1890, 1930-1970, 2130-2150, and 2180-2200 MHz.[82] We also adopted regional and local PCS service areas based upon MTAs and Basic Trading Areas (BTAs).

76. APC, Cox, and Omnipoint argue that a 30 megahertz MTA grant is necessary to permit their implementation of the systems they have proposed.[83] APC states that the 10 megahertz BTA blocks at 2130-2200 MHz are too small, expensive, and time-consuming to clear, and require equipment that is costly and not yet available. APC explains that equipment to operate in the 2130-2200 MHz band will not be available until 1997. APC further contends that the crowded nature of the 2130-2200 MHz band precludes the use of some technologies, including CDMA. APC also argues that the 20 megahertz BTA block at 1880-1890/1960-1970 MHz is inadequate in many cities because of congestion. Finally, without regard to the amount of spectrum, APC argues that the economic integrity of the Washington/Baltimore market for which it has applied for a preference would be impaired by granting it any of the BTA blocks because Washington and Baltimore are in different BTAs. According to APC, using current technology, a 20 megahertz BTA block could not be combined with a 10 megahertz block in the 2130-2200 MHz band. APC concludes that grant of only a single 10 or 20 megahertz BTA block would prevent it from implementing the service it pioneered and would be inconsistent with its preference request.

77. Cox contends that preferences should not be awarded in the 2130-2200 MHz band because those specific frequencies have not been the subject of any preference applicant's tests; and that a 20 megahertz BTA grant would preclude fully developing its service in the 1850-1990 MHz band. Cox states that it performed studies of microwave congestion in the 1850-1990 MHz band and contends that from these studies it determined that 40 megahertz is the minimum necessary to bring a fully functional range of PCS to the public.[84] Further, Cox maintains that given the nature of the mobile communications market, wide service areas such as MTAs will best serve customers. Finally, Cox states that Commission award of a preference other than a 30 megahertz MTA would not ensure enough spectrum for an innovator to provide service.

78. Omnipoint asserts that the 2130-2200 MHz band is virtually unusable with its system design; and that its system is optimized for use at 1850-1990 MHz with a total of 30 megahertz or more per operator. Omnipoint states that in its June 25, 1992 filing with the Commission it specified that it required such a spectrum assignment. It maintains that its system has been designed to co-exist with 5 and 10 megahertz microwave links at 1850-1990 MHz, rather than 800 and 1600 kilohertz links at 2130-2200 MHz; and argues that all of the key RF components in its equipment would have to be different to operate at 2130-2200 MHz. Omnipoint states that while its system can operate in the 2400-2483 MHz Part 15 unlicensed band, as well as in the 1850-1990 MHz PCS band, it is not designed to operate between 1990-2400 MHz. Further, it states that its system is designed to be used in a three frequency reuse pattern to obtain the economic benefits of its innovations, and that such a reuse pattern requires at least 30 megahertz.

79. Cablevision, Southwestern Bell Corporation (SBC), and Fidelity Investments and Cylink Corporation (Fidelity/Cylink) disagree that a 30 megahertz MTA license should be awarded pioneers.[85] Cablevision contends that the Commission's challenge is to fit pioneer's preference awards into the PCS structure, rather than accommodating

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[81] *Id.* at 26.

[82] *See Second Report and Order, supra* note 10.

[83] *See* APC letter of September 27, 1993 to Chairman Quello and Commissioners Barrett and Duggan; Cox letter of September 28, 1993 to Chairman Quello and Commissioners Barrett and Duggan; and Omnipoint letter of September 29, 1993 to Acting FCC Secretary William F. Caton.

[84] Cox notes that 2 GHz PCS licensees may aggregate spectrum up to 40 megahertz in a geographic area; *see Second Report and Order, supra* note 10, 8 FCC Rcd at 7813.

[85] *See* Cablevision letter of October 5, 1993 to Chairman Quello and Commissioners Barrett and Duggan; SBC letter of October 14, 1993 to Chairman Quello and Commissioners Barrett and Duggan; and Fidelity/Cylink letter of October 8, 1993 to Acting FCC Secretary William F. Caton. Cablevision filed a pioneer's preference request in this proceeding, *see* PP-10, and subsidiaries of SBC and Fidelity/Cylink also filed pioneer's preference requests, *see*, respectively, PP-17 and PP-42.

the desires and expectations of the preference grantees. According to Cablevision, this can best be accomplished by awarding pioneers the 20 megahertz BTA block at 1880-1890/1960-1970 MHz. Cablevision maintains that a 10 megahertz block at 2130-2200 MHz would unfairly marginalize the contribution made by the grantees at 1850-1990 MHz, but that a 20 megahertz BTA block would permit the grantees to use the band in which they have conducted experiments, while not conveying a windfall 30 megahertz MTA block that could have a preclusive effect on other licensees. SBC concurs, stating that a 20 megahertz BTA block would be enough spectrum to provide adequate PCS service.[86]

80. We find the arguments of APC, Cox, and Omnipoint persuasive. Each applicant conducted experiments in the 1850-1990 MHz band, not in the 2130-2200 MHz band. An award in the lower band is appropriate and will ensure that the grantees can implement the services they have proposed. While we continue to believe that the upper band has the potential to provide a variety of important PCS services, APC, Cox, and Omnipoint have designed their systems and conducted their experiments in the 1850-1990 MHz band. Further, we are not convinced that a 20 megahertz BTA grant would be adequate, given the nature of the systems proposed.[87] Accordingly, we are awarding each pioneer a 30 megahertz MTA block in the area each requested. If otherwise qualified, APC will be licensed to use Channel Block A in the MTA that includes Washington, D.C. and Baltimore, Maryland; Cox will be licensed to use Channel Block A in the MTA that includes San Diego, California; and Omnipoint will be licensed to use Channel Block A in the MTA that includes northern New Jersey.[88]

Pioneer's Preferences Denied

81. *American Portable Telecommunications, Inc. (PP-7).* APT requests a pioneer's preference for having integrated traditional paging service with a proposed PCS service providing CT-2 type voice communications with one-way alpha-numeric messaging. APT names its service Enhanced Personal Message Service (EPMS). APT states that EPMS is designed to provide: 1) improved control by users over incoming and outgoing messages; 2) enhanced functions, including call forwarding and redirecting of calls; 3) improved spectrum efficiency over existing and proposed PCS systems; and 4) cost savings over existing and proposed PCS systems. APT also states that its system will take advantage of digital compressed voice in combination with EPMS to provide additional services.

82. In APT's proposed system the customer would receive a paging message on a 900 MHz paging channel. The customer could acknowledge the page by making a connection over a PCS channel, or have the EPMS redirect the call. APT maintains that its proposal constitutes a new service because it combines digital communications using PCS with a two-way messaging or acknowledgement capability. APT calls this its "message back" feature.[89] APT claims that its proposal is innovative because its enhanced messaging service would permit users to exercise control over incoming and outgoing message traffic.

83. In comments on APT's pioneer's preference request, GTE states that the request should be denied because it is grounded in outdated CT-2 technology. GTE states that APT's proposed PCS system will be capable only of providing two-way voice communications near microcell base stations. As such, according to GTE, the paging device is a necessary component because it is the only device which is powerful enough to reach the subscriber and make the initial contact.[90]

84. In reply, APT contends that GTE did not offer any justification for arguing for denial, given that APT is continuing to conduct its experimental program.[91] APT requests that the Commission hold open the record until its tests are completed.

85. In our *Tentative Decision* we proposed to deny APT's request because APT had not demonstrated the feasibility of its technology or that it had developed the capabilities or possibilities of a specific identifiable PCS technology or service or had brought it to a more advanced or effective state.[92]

86. In its comments APT argues that it has demonstrated its key role in developing its proposed EPMS, which it argues is significantly innovative compared to existing and proposed PCS services in that EPMS gives control of the call to the subscriber and is spectrum efficient in its use of

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[86] Fidelity/Cylink argue that a 10 megahertz BTA block at 2130-2200 MHz would be adequate because such a block would enable the provision of full-featured PCS, as well as many specialized PCS services. Fidelity/Cylink contend that the paramount technical challenge in the design of PCS spread spectrum radios is the development of the digital baseband, and not the design of the radio frequency segment, and accordingly use of the 2130-2200 MHz band is not a substantial limiting factor. Fidelity/Cylink state that while design of a common antenna to serve both the 1850-1990 MHz and 2130-2200 MHz bands would require significant technical effort, this effort is not insurmountable. Further, according to Fidelity/Cylink, a common antenna is not necessary to realize the benefits of an allocation at 2130-2200 MHz. Fidelity/Cylink assert that a 10 megahertz block in this band can, with the use of emerging technologies such as Synchronous CDMA/FDMA/TDD, achieve greater system capacity than an existing 25 megahertz cellular radio block.

[87] Additionally, we note that in our Notice of Proposed Rulemaking on competitive bidding we proposed to set aside the 20 megahertz BTA block for small businesses, rural telephone companies, and businesses owned by minorities and women. *See* Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rule Making*, 8 FCC Rcd 7635 at 7655 (1993).

[88] To provide certainty to other parties that may be preparing analyses for 30 megahertz MTA channel blocks we are designating the specific spectrum and geographic areas for the pioneers. Each grantee, if otherwise qualified, will be licensed for Channel Block A, 1850-1865 and 1930-1945 MHz, in the MTAs noted *supra*. The existing pioneer's preference rules will apply to these license grants, *see* note 2 *supra*. The existing pioneer's preference rules do not contemplate payment for the value of the spectrum awarded, *see* 47 CFR § 1.402; *First Report and Order*, ET Docket No. 93-266, *supra* note 2, at note 23. Therefore APC, Cox, and Omnipoint will not be required to pay any spectrum-based charge for the grants.

[89] APT defines "message back" technology as that which provides a two-way acknowledgement of a page and its "meet me" concept as that which allows immediate connection between the person initiating the page and the user.

[90] *See* GTE at 10 (January 24, 1992).

[91] *See* APT Reply at 7 (February 18, 1992).

[92] Our pioneer's preference rules require that an applicant demonstrate the technical feasibility of its system either through a technical showing or by results from experiments. *See Pioneer's Preference Report and Order* and *Pioneer's Preference Recon. Order, supra* note 2, 6 FCC Rcd at 3493 and 7 FCC Rcd at 1809, respectively.

paging channels for the initial contact.[93] APT states that it originated and developed its proposed service that integrates PCS voice communications with two-way messaging capability. According to APT, its proposed service puts control of the incoming call in the hands of individual wireless service customers through its handheld unit and provides the ability of redirecting an incoming call in many ways not currently available in the wireline service. APT asserts that these new capabilities allow the subscriber to screen and control the call, include taking a message and forwarding or redirecting it to another location. APT also maintains that using a paging frequency for the incoming contact results in significant efficiencies in spectrum use and that this translates to a reduction in user costs.[94]

87. In addition, APT asserts that it first proposed its service concept in July 1991, long before any other participant in this proceeding. It contends that this timing confirms its responsibility for development and demonstration of its proposed new service. Also, APT claims that market projections and user surveys indicate public demand for its proposed service. Finally, APT argues that the Commission should consider service innovation aspects of its proposal, not just the technology, and that in the *Tentative Decision* the Commission ignored proposals that enhance services.

88. We find that integrating two-way voice service with a paging service is not innovative and that APT also has not demonstrated innovation in developing new communications technology. APT's proposed system relies on older technology to provide a service that is not a significant enhancement of existing services. While APT states that its system will use digital compressed voice, it does not define this term nor indicate what role APT played in the development of this technology. Accordingly, we deny APT's pioneer's preference request.[95]

89. *Associated PCN Corporation (PP-8).* Associated requests a pioneer's preference for its proposal to provide a PCS service that would provide voice and data mobile services and share the 1850-1990 MHz band by avoiding interference with incumbent fixed microwave operations through what Associated contends is an innovative use of technology.[96] This technology would combine frequency hopping and direct sequence CDMA spread spectrum, and would be capable of providing "spot capacity" on demand by hopping over 13 different 5 megahertz CDMA channels in each direction (transmit and receive), thus requiring a total of 130 megahertz (5 megahertz times 13 channels in each direction). Associated states that the key advantage of its proposed system is its ability to be implemented immediately without displacing existing 2 GHz users. This capability would be achieved by mapping existing channel usage and by using extensive software to select channels that are not in use. Thus, Associated argues its system can be overlayed on an existing service without affecting that service. The service would provide both digital voice and data messaging channels on demand. Associated claims it deserves a pioneer's preference because it was the first entity to combine direct sequence spread spectrum, frequency hopping, and frequency management concepts into a PCS system.

90. Associated states that its system would feature small microcells of between .5 to 5 miles in radius; small base stations that are inexpensive and can be mounted in various locations including on poles or buildings; careful frequency planning and sophisticated software in the portable units to allow intelligent spectrum sharing with other systems; the capability to accurately locate each mobile; and multi-channel usage that allows additional service and lower rates.

91. Associated contends that its proposal is innovative because: 1) it was the first to combine direct sequence spread spectrum, frequency hopping, and frequency management into one system for interference avoidance; 2) it uses microcell technology employing cells of .5-5 miles in radius resulting in 10 times the number of voice channels as traditional cellular radio systems; and 3) it features a frequency sharing concept developed prior to that of APC.[97]

92. In comments to Associated's pioneer's preference request, APC maintains that Associated's attempt to develop a cellular-type PCS that uses frequency hopping is not innovative and does not warrant a pioneer's preference.[98] APC asserts that Associated's system does not provide interference avoidance as does the APC system and also contends that Associated has never tested a complete PCS system nor demonstrated the technical feasibility of its approach. PacTel also argues that Associated has not demonstrated the feasibility of its proposed system.[99] Finally, Rockwell International Corporation (Rockwell) maintains that Associated's proposed system may cause interference to existing microwave systems.[100] Rockwell states that narrowband systems such as that of Associated, when used in tall buildings, cannot prevent interference to microwave systems unless global planning is done, resulting in reduction of the capacity of the system. Further, Rockwell states that narrowband systems can be potentially more complex due to the fact that the narrowband interference has higher power and less white RF noise (random noise) than wideband systems and will affect more distant microwave users.

93. In the *Tentative Decision*, we found that the pioneer's preference request filed by Associated constituted a compilation or aggregation of existing communications technologies or systems or did not constitute a unique or innovative technology or service. Therefore, we tentatively denied Associated's request.

94. In comments filed in response to the *Tentative Decision*, Associated contends that the Commission proposed to award APC a pioneer's preference rather than Associated because we concluded that APC had commenced activities prior to Associated. Associated asserts that such a basis for award of a pioneer's preference is illegitimate, but

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[93] *See* APT at 2 (January 29, 1993).

[94] *Id.*

[95] Although we tentatively denied APT's pioneer's preference request for failing to demonstrate technical feasibility, after a complete review of the record, we conclude that APT fails the test of not demonstrating a new or innovative contribution to communications technology.

[96] *See* Associated's pioneer's preference request at 4-2 (August 13, 1991).

[97] *Id.* at 2-4 through 4-2.

[98] *See* APC reply, appendix at 11 (February 18, 1993).

[99] *See* PacTel at 9 (January 24, 1992).

[100] *See* Rockwell at 2 (June 24, 1992).

that in any event, it preceded APC both with respect to the proposal of a frequency agile spectrum sharing technology and the field testing of this technology. Additionally, Associated maintains that its system is superior to that of APC, which it maintains uses mostly CT-2 technology and off-the-shelf hardware. Associated contends that it has developed a true PCS system that utilizes custom equipment including sophisticated frequency mapping software.

95. In reply comments to the *Tentative Decision*, APC argues that the entire scope of Associated's developmental activity lies in its attempt to develop a cellular-style handoff technique for PCS using frequency hopping, as opposed to APC's frequency management system.[101] Further, APC maintains that Associated has not deployed a working PCS system to demonstrate its approach.

96. Associated's proposed system would require each licensee to be assigned 130 megahertz of spectrum and therefore is incompatible with the rules we adopted in the PCS *Second Report and Order*.[102] Further, Associated has not demonstrated that its system will avoid interference to existing fixed microwave licensees. Finally, Associated's approach is a frequency overlay scheme, and as such, is not new and innovative technology. Accordingly, we deny Associated's request for a pioneer's preference.[103]

97. *Atlantic Cellular Company, L.P. (Atlantic) (PP-9).* Atlantic filed a pioneer's preference request seeking to use microwave facilities to be integrated with currently existing PBX and cellular technology to provide a low cost PCS network that would allow switching from the handset between the microwave and cellular system at the discretion of the user. However, Atlantic does not provide technical design details of its system.

98. In comments on Atlantic's proposal, PacTel states that insufficient detail is provided by Atlantic to demonstrate the feasibility of its system.[104] In its comments, GTE argues that Atlantic's band switching technique has been in practice for years and is deployed in Japan and Europe and as such does not warrant a preference.[105]

99. In our *Tentative Decision* we proposed to deny Atlantic's pioneer's preference request for failure to submit either the preliminary results from an experiment or a sufficient showing of technical feasibility. Atlantic did not respond to the *Tentative Decision*. Accordingly, we deny Atlantic's pioneer's preference request.

100. *Cablevision Systems Corporation (PP-10).* Cablevision proposes to provide a range of PCS services including voice and interactive data and video by using cable television facilities to interconnect microcells. It requests a preference for its proposal to use Cable Television Relay Service (CARS) frequencies on a secondary basis for the provision of mobile to base PCS communications. Cablevision claims that it was the first to outline in detail the possibilities of utilizing cable television facilities for PCS. It states that it plans to use CDMA modulation techniques and that subscriber units will include dynamic power control circuitry. It proposes to use a distributed antenna system that uses remote antenna drivers connected to microcells to form a seamless coverage area. Cablevision contends that its "star architecture" enables efficient spectrum reuse by utilizing multiple trunk outputs emanating from the cable headend. Cablevision also claims to use centralized intelligence to achieve call handoff between microcells in a cost effective manner, and states that it has demonstrated handoff at vehicular speeds in its PCS experiments.

101. In comments to Cablevision's pioneer's preference request, GTE asserts that Cablevision did not demonstrate the feasibility of its technology.[106] PacTel concurs, contending that Cablevision's request is "speculative and premature," and that Cablevision's concepts are vague and the information supplied is insufficient to enable the Commission to judge the merits of the proposal.[107] However, Associated disagrees, stating that Cablevision has met most of the requirements for a preference and that its technical discussion appears complete.[108]

102. In reply comments, Cablevision asserts that GTE and PacTel ignored the unique applications that could stem from using cable television facilities to carry PCS.[109] Cablevision states that it has made major progress towards demonstrating the feasibility of its proposal in its pioneer's preference request and quarterly reports, and that GTE's and PacTel's analysis ignore its accomplishments.

103. Cablevision's request was tentatively denied in the *Tentative Decision* for failure to develop and demonstrate its proposed PCS technology and also for failure to demonstrate its specific contributions to the technology and equipment used in its experiments. We further stated that Cox had preceded Cablevision and other cable entities in its cable/PCS development. In comments to the *Tentative Decision*, Cablevision replies that it filed its experimental PCS application in September 1990, prior to initiation of Canadian trials and efforts to develop cable-based CT-2 equipment, and that this application contained critical concepts absent from Cox's experimental application.[110] Cablevision acknowledges that the Nexus Engineering Corp. (Nexus) developed RAD technology for CT-2 implementation, but maintains that it and Nexus worked together to convert this technology to provide PCS to subscribers at vehicular speeds. Cablevision claims that prior to this enhancement, a subscriber could not move from one RAD area to another. Cablevision asserts that no other party has made comparable contributions to enhancement of cable-based RAD or distributed antenna technology. Cablevision also asserts that its experiment demonstrated the feasibility of its star architecture.

104. We note that several entities have proposed cable-based PCS systems in this proceeding. We believe that Cablevision has established itself as a contributor to cable-

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[101] *See* APC reply at 11 (March 1, 1993).

[102] We are not permitting PCS licensees to have an ownership interest in more than 40 megahertz in a geographic area; *see Second Report and Order, supra* note 10, 8 FCC Rcd at 7813.

[103] As discussed in para. 30, *supra*, since there are substantive differences between the pioneer's preference requests of Associated and APC, there is no need to consider their filing timetables.

[104] *See* PacTel at 14 (January 24, 1992).

[105] *See* GTE at 7 (January 24, 1992).

[106] *See* GTE at 16 (January 24, 1992).

[107] *See* PacTel at 15 (January 24, 1992).

[108] *See* Associated at 7, 10, 12, 15 (January 24, 1992).

[109] *See* Cablevision Reply at 8-10 (February 18, 1992).

[110] *See* Cablevision at 6 (January 29, 1993).

based PCS, but we believe that it has failed to meet the threshold of innovativeness necessary to qualify for a pioneer's preference. Specifically, the developments that Cablevision appears to be responsible for are: 1) the use of CARS frequencies for PCS service, 2) the establishment of PCS in a star architecture, and 3) the enhancement work with Nexus to permit its RAD to handoff at vehicular speeds. Regarding the first development, we cannot give a preference for the proposal to use CARS frequencies for PCS because we did not adopt this proposal in the *Second Report and Order*. Regarding the second development, other entities have also proposed the use of a star architecture for their cable plant. This architecture may enhance PCS operation over that of a tree/branch architecture,[111] but it is a component of the cable television network and not a development created for the implementation of PCS on the network. Therefore it does not qualify as a PCS innovation. Hence, the single contribution for which Cablevision appears to be partially responsible is its work with Nexus' RAD technology to permit handoff at vehicular speeds. However, Cablevision has not clearly defined its own specific role in developing this technology. Also, we note that at lower frequencies vehicular handoff was achieved many years ago by cellular radio providers. Accordingly, we deny Cablevision's pioneer's preference request.

105. *Linkatel Communications, Inc. (LCI) (PP-12).* LCI requests a pioneer's preference to provide PCS service using a fiber optic ring network that would carry digital voice and data signals to various locations in a ring configuration and hand-off individual voice signals to any point in the ring. LCI states that it plans to use direct sequence spread spectrum CDMA for providing high quality PCS but does not specify the bandwidth or other technical specifications of its spread spectrum design.

106. PacTel and GTE comment that the LCI proposal is quite vague and does not appear to be innovative because many parties began work on use of CDMA for spectrum sharing before LCI.[112] In the *Tentative Decision*, we proposed to deny LCI's request for failure to demonstrate the technical feasibility of its proposal. LCI did not respond to the *Tentative Decision*. Accordingly, we deny LCI's pioneer's preference request.

107. *LiTel Telecommunications Corporation (LiTel) (PP-13).* LiTel requests a pioneer's preference for its proposal to use point-to-point Part 15 spread spectrum communications links to provide backbone or infrastructure support for PCS.[113] LiTel maintains that it is a leader in the development of PCS and the first to seek authority to test a Part 15 spread spectrum system in the 2.4-2.4835 and 5.725-5.85 GHz (2.4 and 5.8 GHz) bands. LiTel asserts that this infrastructure could be used as part of the infrastructure of a PCS network. It states that it plans to test spread spectrum transmission in the 2.4 and 5.8 GHz bands for point-to-point applications.[114]

108. In comments on LiTel's request, PacTel states that deficiencies in the request should lead to its denial.[115] PacTel maintains that LiTel's request is vague and lacks details of its proposed service and innovation. GTE also argues that the Commission should deny the LiTel request because, GTE asserts, it is focused on planned research, devoid of actual development, and fails to demonstrate the technical feasibility of its proposed system. Associated also questions whether LiTel's proposal warrants a preference.

109. In reply comments, LiTel counters that it has brought PCS technology to a more advanced and effective state by its testing of Part 15 point-to-point spread spectrum devices at the 2.4 and 5.8 GHz ranges to supplement PCS systems.[116] According to LiTel, its development of these devices will reduce the spectrum needed for PCS.

110. In our *Tentative Decision* we proposed to deny LiTel's request for a preference because LiTel had not demonstrated the feasibility of its proposed technology or that it had developed the capabilities or possibilities of a specific identifiable PCS technology or service or had brought it to a more advanced or effective state.

111. LiTel responds that its three years of developmental testing demonstrate the technical feasibility of Part 15 point-to-point spread spectrum systems that can be used to support PCS systems. Further, LiTel states that it has demonstrated technical feasibility by successfully testing equipment. Specifically, it states that it has successfully transmitted voice over a 3-mile link and transmitted composite data over back-to-back links of one and 8.6 miles. Further, LiTel asserts that it brought out the capabilities of a specific PCS technology by developing a family of mobile radio communications services that could provide services to individuals and businesses and be integrated with a variety of competing networks using Part 15 equipment that would not interfere with existing users.[117]

112. LiTel maintains that its technology will support PCS by connecting base stations using Part 15 point-to-point wireless links rather than cable or licensed microwave links, and will permit operators to construct mobile networks quickly and inexpensively. It argues that its proposed system would permit economical and rapid deployment of PCS services and substitution of existing infrastructure for spectrum.

113. LiTel's pioneer's preference request is based upon its claimed innovation in developing spread spectrum point-to-point communications in the unlicensed Part 15 bands at 2.4 and 5.8 GHz for use as backbone for a dedicated PCS system. LiTel's technology and backbone service already is authorized at these frequencies by our rules. Insofar as LiTel argues that its fixed technology may be used to support PCS, it has developed but one of a number of methods available to support the service. LiTel has not demonstrated that its fixed technology is an integral part of a specific PCS system or PCS systems in general. With regard to the family of PCS services that LiTel argues

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[111] The tree/branch architecture consists of a main trunk that distributes the signal from the headend to an area and branches off the main trunk that distribute the signal to individual subscribers. This distribution architecture requires multiple amplifiers in series to transmit a signal from the headend to the end of a branch.

[112] *See* PacTel at 16 and GTE at 8 (January 24, 1992).

[113] *See* Pioneer's Preference Request at 2 (October 10, 1991) and experimental license application, 1947-EX-PL-91, exhibit 2 (April 25, 1991).

[114] These bands already are designated for use under Part 15, which allows point-to-point spread spectrum operations.

[115] *See* PacTel at 16 (January 24, 1992).

[116] *See* LiTel Reply at 2 (February 14, 1992).

[117] *See* LiTel at 4 (January 29, 1993).

it has developed, it has not specified what these services are or what its role has been in their development. Thus, LiTel has not demonstrated by way of a technical showing or through experimental test results a specific contribution to 2 GHz PCS. Accordingly, we deny Litel's pioneer's preference request.

114. *PCN America, Inc. (PP-15).* PCNA requests a pioneer's preference for its proposal to implement PCS in the 2 GHz fixed microwave bands using microcells that it claims can co-exist with the current fixed users through the use of broadband CDMA spread spectrum at 1850-1990 MHz. Its request is based upon small, inexpensive, pocket-sized handsets that communicate with cells that are considerably smaller than those used in the cellular industry today. PCNA states that in November 1989 it was first to propose rules to authorize a personal communications network; originate a cellular concept that could co-exist with current users of the 2 GHz band; conduct extensive tests using spread spectrum techniques that demonstrate the spectrum sharing capabilities of its system; demonstrate public demand for PCS through a nationwide survey; and coordinate industry-wide PCS initiatives involving other PCS experimental licensees, including making its technology available to others.[118]

115. Specifically, PCNA proposes to use direct sequence spread spectrum and spread the signal over 48 megahertz for transmitting between handsets and microcells.[119] The base stations would automatically adjust the power of each handset so that the power received by the base station from each handset is the minimum required to complete the transmission without interference.

116. In comments to the PCNA pioneer's preference request, PacTel states that PCNA has demonstrated substantial developmental work in the area of 2 GHz PCS but has not submitted sufficient information to warrant a preference.[120] Both PacTel and PCNS-NY assert that PCNA has not demonstrated the technical feasibility of its system.[121] GTE concedes that PCNA has presented a colorable claim for a preference, but argues that the request should be denied because it is based solely on an assertion that PCNA was the originator of the PCS spectrum sharing concept.[122] GTE also maintains that PCNA's experimental data lacks the information necessary to support its claim that spectrum sharing is feasible.

117. In the *Tentative Decision* we found that although PCNA had devoted substantial effort and resources in developing and demonstrating a broadband spread spectrum proposal, its system did not comply with the Commission's channelization proposal for the 2 GHz band as outlined in the *Notice of Proposed Rule Making* (*Notice*) in this proceeding.[123] We also concluded that PCNA had not demonstrated that broadband spread spectrum operations could be used successfully to avoid interference to existing fixed users. Accordingly, we proposed to deny PCNA's request.

118. In comments responding to the tentative denial, PCNA contends that it merits a preference because it is responsible for the fundamental concepts that underlie the Commission's vision of PCS. It maintains that it was tentatively denied a preference because of a single element of its proposal that was not adopted by the Commission,[124] the use of two 48 megahertz channels for broadband spread spectrum. It asserts that it outlined the initial idea and substantially the entire regulatory scheme for PCS to the Commission. It further argues that its November 1989 petition for rule making first recommended locating PCS in the 2 GHz band and that it was the first to propose sharing this band with incumbent microwave users on a co-primary basis. Finally, PCNA maintains that it conducted the first significant demand study of PCS, as well as propagation and interference tests in the 2 GHz band.[125] While it expresses support for the grants of pioneer's preference awards to APC, Cox, and Omnipoint, it argues that it first advanced many of the concepts credited to these companies.

119. In reply comments to the *Tentative Decision*, PCNA contends that no company in the proceeding contributed to PCS as much as it did. It reiterates that it was first to: 1) petition for a rule making to allocate PCS spectrum; 2) focus attention on the need for spectrum at 1850-1990 MHz; 3) propose sharing the band with the incumbent microwave users and to perform extensive interference testing; 4) demonstrate that fixed microwave use was light in the band; 5) demonstrate the demand for PCS; and 6) propose the advantages of CDMA for microcell mobile communications.[126]

120. Although we recognize that PCNA filed the petition that contributed to initiating our PCS proceeding and made a substantial effort to develop technology to facilitate the service, PCNA does not meet the pioneer's preference criteria set forth in our rules. After PCNA's petition, the concepts and proposed services envisioned for PCS have expanded substantially and there have been a large number of other entrepreneurs that, like PCNA, obtained experimental licenses and performed extensive experiments. In adopting the pioneer's preference rules the Commission observed that an otherwise qualified innovating party would risk that the Commission might not accept its proposal.[127] The PCS *Second Report and Order* adopted rules that provide for the implementation of PCS based upon an entirely different technological concept than proposed by PCNA, and to which it devoted its technical development

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[118] *See* PCNA Reply at 2 (February 18, 1992).

[119] *See* PCNA at 16 (August 7, 1991). However, later PCNA proposed testing a system that spread over 40 megahertz of contiguous spectrum using TDD for transmission of the spread spectrum signal in both the transmit and receive mode in the same 40 megahertz. *See* PCNA letter to Chief Engineer, Federal Communications Commission, File No. 1343-EX-PL-90, at 3 (May 20, 1992). Based on the comments received in this proceeding regarding the likelihood of interference to fixed microwave users from a broadband spread spectrum system, the Commission did not approve the experimental testing of the 40 megahertz TDD system proposed by PCNA and concluded that broadband overlay type spread spectrum systems were not viable for avoiding interference to the 2 GHz fixed microwave users.

[120] *See* PacTel at 10 (January 24, 1992).

[121] *Id. See also* PCNS-NY Reply at 10 (February 18, 1992).

[122] *See* GTE at 17 (January 24, 1992).

[123] *See Notice of Proposed Rule Making and Tentative Decision*, GEN Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 (1992).

[124] *See* PCNA at 5-6 (January 28, 1993).

[125] *See* PCNA at 2 (January 28, 1993) and Reply at 10 (March 1, 1993).

[126] *See* PCNA Reply at 3-6 (March 1, 1993).

[127] *See Pioneer's Preference Report and Order, supra* note 2, 6 FCC Rcd at 3492.

efforts. Our rules provide maximum spectrum assignments of 40 megahertz per licensee (20 megahertz paired with a second non-contiguous 20 megahertz). This spectrum plan precludes use of PCNA's system without regard to whether using PCNA's system would cause interference to existing microwave systems. Most importantly, PCNA's broadband spread spectrum system requires a total of 40 to 100 megahertz of contiguous spectrum. Accordingly, we deny PCNA's request for a pioneer's preference.

121. *Personal Communications Network Services of New York, Inc. (PP-16).* PCNS-NY requests a pioneer's preference for developing a microcell broadband CDMA system capable of sharing spectrum with fixed microwave services, proposing the use of Digital Termination Service (DTS) for PCS backbone communications, proposing a plan for migrating existing microwave operations to other frequencies, and developing its service to operate in what it asserts is the unique and harsh radio environment of New York City. It proposes to provide a service that entails delivering voice, data, and image transmission services to users in high density environments, such as multi-story buildings, between such buildings, and from public access locations. It proposes broadband CDMA microcells sharing spectrum with existing microwave operations and using DTS frequencies at 10 and 18 GHz to provide backbone communications between microcells.[128]

122. PCNS-NY asserts that it is the sole party to propose and develop an innovative plan for migrating existing microwave users in the 1850-1990 MHz band to higher frequencies and to propose that this relocation be accomplished through use of voluntarily negotiated agreements. It also claims that it is unique in proposing that existing users be relocated to higher frequencies at no cost to existing users and in a manner that minimizes the potential for disruption to the operations of the existing users.

123. In comments to PCNS-NY's pioneer's preference request, Cox asserts that PCNS-NY should not receive a preference because "the mere tendering of an experimental license application and the claim that the results will somehow assist the Commission is an insufficient basis for an award."[129] Similarly, PacTel claims that PCNS-NY's only innovation is the idea to use DTS frequencies to connect base stations, and that this is insufficient for a preference award.[130] PacTel also asserts that technical feasibility has been shown only in a controlled environment and that a more realistic showing of feasibility is needed. GTE maintains that use of DTS frequencies is not innovative and that until verifiable data on PCNS-NY's sharing technology can be reviewed, no demonstration of feasibility can be claimed.[131]

124. In reply, PCNS-NY asserts that opposing comments reflect flawed analysis of its preference request.[132] It argues that comments stating that it has not demonstrated technical feasibility are unsupported and that, in any event, the Commission's rules do not require such demonstration if the applicant has commenced an experiment. It claims that Cox ignored the substantial testing and extensive progress reports that it provided to the Commission.

125. In the *Tentative Decision* we found that PCNS-NY's proposal appeared to be a compilation or aggregation of existing communications technologies or systems. Additionally, we tentatively found that PCNS-NY failed to demonstrate that its proposal constitutes a unique or innovative technology or service proposal. Therefore we proposed to deny PCNS-NY's request.

126. In comments filed in response to the *Tentative Decision*, PCNS-NY states that the Commission failed to apply the pioneer's preference rules in a reasonable manner by singling out the innovations of only three applicants when the *Notice* contains aspects that also are the reasonable outgrowth of proposals developed and demonstrated by PCNS-NY and other applicants.[133] Specifically, PCNS-NY argues that the Commission failed to account or credit it for proposing relocation of the existing microwave users through negotiations. Further, PCNS-NY asserts that the Commission failed to provide a case-by-case analysis of the preference requests it tentatively denied and failed to provide an adequate basis for distinguishing the tentative grants from the tentative denials. It also states that not sufficiently articulating specific reasons for the tentative denials prevents parties from making meaningful comments and leads to speculation as to the reason for denial.

127. PCNS-NY further maintains that the Commission erred in denying its request and incorrectly credits APC with its innovation. PCNS-NY claims that it, and not APC, is the pioneer of procedures to negotiate voluntary agreements with microwave users to relocate to higher frequencies on terms favorable to the microwave users. PCNS-NY claims that it was the first to demonstrate the widespread acceptance of its relocation procedure through its experimental efforts and that this innovation contributed to the Commission's establishment of PCS and its proposed rules. It asserts that the Commission has recognized the spectrum sharing innovations of Omnipoint and APC, but has not credited PCNS-NY for its negotiations proposal, which it claims is a spectrum management tool that remains a fundamental aspect of providing spectrum for PCS. PCNS-NY claims that its migration proposals preceded all other such proposals; therefore, its request cannot be denied as constituting a compilation or aggregation of existing communications technologies or systems.

128. APC responds that its proposal of "(i) sharing spectrum with microwave users and (ii) relocating some microwave users--with full cost reimbursement, and only to reliable alternative frequencies--formed the basis for the Commission's decision in ET Docket 92-9."[134] It states that it proposed this general approach as early as October 1, 1990 and that PCNS-NY's plan from the outset was not spectrum sharing, but rather band clearing.

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[128] PCNS-NY initially tested SCSM's broadband CDMA equipment, but stated in a 1992 experimental report that it would use Qualcomm's narrowband CDMA equipment. *See* PCNS-NY Report at 1 (September 30, 1992).

[129] *See* Cox at 2-3 (January 24, 1992). On March 17, 1992, Cox requested that its January 24 comments that address the PCNS-NY preference request be dismissed and stated that Cox takes no position on the merits of the PCNS-NY request.

[130] *See* PacTel at 17 (January 24, 1992).

[131] *See* GTE at 17 (January 24, 1992).

[132] *See* PCNS-NY Reply at 8 (February 18, 1992).

[133] *See* PCNS-NY at 8-9 (January 29, 1993).

[134] *See* APC Reply at 15 (March 1, 1993).

129. We disagree with PCNS-NY's argument that it deserves a pioneer's preference for proposing a migration of 2 GHz fixed operations based upon negotiations, and that the adopted relocation scheme is an outgrowth of its proposal. The rules adopted in ET Docket No. 92-9 providing for fixed microwave migration from the 2 GHz band are the result of a rule making proceeding in which numerous comments were filed and considered and of which the results are not totally consistent with PCNS-NY's proposal; *e.g.*, we did not propose to relocate all microwave operations or to restrict microwave relocation to existing common carrier microwave bands, as recommended by PCNS-NY, but instead provided for sharing of the 2 GHz band and implemented a plan that provides for a variety of relocation alternatives, including non-radio media, private microwave bands, and common carrier microwave bands. Moreover, PCNS-NY's negotiation proposal is relevant to PCS only in the broadest sense; it is a spectrum planning design, not a "technology" or "service" contemplated by the pioneer's preference rules.

130. We also disagree that the Commission failed to provide a case-by-case analysis of each request or an adequate basis for distinguishing the tentative grants from the tentative denials. The Commission analyzed each application on a case-by-case basis and articulated the criteria necessary to be granted a tentative preference. While many tentative denials were grouped together, this is appropriate because they had similar deficiencies. After the additional opportunity provided the applicants and the public to comment upon our tentative conclusions, we now address each application individually. We note that our *Tentative Decision* clearly spelled out the attributes that are necessary to be granted a preference.[135]

131. We also conclude that PCNS-NY's proposal to use 10 and 18 GHz DTS frequencies for PCS backbone communications is not innovative. There are a number of bands that may be used for such communications, and our recent decision in the emerging technologies proceeding has reallocated the 10 GHz band from DTS to point-to-point microwave use.[136] Further, merely identifying bands that may be used to support PCS is not innovative in the sense intended to be recognized by the pioneer's preference rules.

132. Finally, PCNS-NY's proposal for the development of a service to operate in the New York metropolitan radio environment does not qualify as an innovation warranting a pioneer's preference.[137] PCNS-NY contracted with SCS Mobilecom to test SCSM's CDMA mobile equipment, but it is unclear what innovation PCNS-NY contributed to this test. PCNS-NY also fails to specify any innovations for which it is responsible that would differentiate the tests done for it by SCSM from the tests that SCSM performed for other preference applicants. Accordingly, we deny PCNS-NY's pioneer's preference request.

133. *Southwestern Bell Personal Communications, Inc. (PP-17).* SBPC requests a pioneer's preference based upon its proposal to utilize spectrum between existing microwave systems for PCS made possible by its Intelligent Multiple Access Spectrum Sharing approach. SBPC's IMASS approach consists of microwave signal level monitoring, data base look-up of microwave systems, information processing, and PCS channel assignment. The microwave signal levels are periodically measured across the frequency band in a given area. A database search then identifies the microwave frequencies being used and calculates the potential interference from a PCS base station or portable to the microwave receiver. This information provides a list of available frequencies within that specific measurement area.[138] In addition, SBPC proposed to demonstrate the use of intelligent networking to provide features such as personal number service, call alerting by pager, inter-network call routing, and call screening.[139] These features would be delivered across multiple networks, including the PSTN and cellular, paging, and portable communications networks in a seamless fashion by experimenting with alternative interfaces between the network switch, PCS switch, and applications processor.

134. In comments on SBPC's proposal, GTE states that the proposal is not innovative insofar as it offers intelligent network features such as Caller ID and Selective Call Screening that are already available. Further, GTE states it is premature to award SBPC a pioneer's preference until SBPC demonstrates the proposal's technical feasibility.[140] Similarly, PacTel argues that SBPC's proposal is speculative and premature, and that its technical feasibility has not been demonstrated. PacTel also states that others tested similar concepts prior to SBPC.[141] Associated maintains that SBPC does not specify exactly what aspect of its proposal is original or innovative.[142]

135. SBPC replies that GTE fails to identify the experiments or vendors that are proposing to offer the same capabilities.[143] Additionally, SBPC claims that no other experimenter has proposed as detailed or as broad a program of experimentation combining new network services and innovative radio technology. SBPC also maintains that it demonstrated technical feasibility in its experimental application and that while field results may be desirable, they are not a prerequisite for a pioneer's preference. In response to Associated, SBPC states that the originality of its proposal has been demonstrated and Associated has chosen to ignore the showings that SBPC has filed.[144]

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[135] *See Tentative Decision, supra* note 8, 7 FCC Rcd at 7795-96.

[136] *See Second Report and Order*, ET Docket No. 92-9, 8 FCC Rcd 6495 (1993), *recon. pending.*

[137] We note that initially PCNS-NY requested a preference for its implementation of broadband CDMA equipment in New York City. However, the rules adopted in the PCS *Second Report and Order* do not permit using broadband CDMA. PCNS-NY's broadband technology proposals therefore are inconsistent with our PCS rules. More recently, PCNS-NY proposed to test Qualcomm's CDMA equipment in New York City. Although Qualcomm's equipment could be used consistent with our rules, proposing use of this equipment is not an innovation attributable to PCNS-NY.

[138] *See* SBPC Quarterly Progress Report Number One at 3-9 (June 17, 1992).

[139] *See* SBPC request for Pioneer's Preference at 3-4 (October 22, 1991).

[140] *See* GTE at 18 (January 24, 1992).

[141] *See* PacTel at 18 (January 24, 1992).

[142] *See* Associated at 8 (January 24, 1992).

[143] SBPC Reply at 2 (February 18, 1992).

[144] *Id.* at 8.

136. In the *Tentative Decision* we proposed to deny SBPC a preference because its proposal constitutes a compilation or aggregation of existing communications technologies or systems or otherwise does not constitute a unique or innovative technology or service proposal. SBPC responds that it was the first to develop and define an active interference avoidance approach to spectrum sharing and that the IMASS system is not a compilation or aggregation of existing communications technologies or systems. According to SBPC, the IMASS algorithm that is the heart of its proposal required development of a new communications system by a third party vendor.[145]

137. In reply to SBPC's comments, APC states that SBPC has not quantified spectrum availability in the 2 GHz band using its IMASS approach in any market or proven that IMASS receivers can improve PCS spectrum availability. APC raises further questions concerning the number of receivers necessary to cover a wide area and states that SBPC has not proven that the IMASS receivers are practical and cost effective.[146]

138. SBPC bases its preference request upon the IMASS system for spectrum sharing and its proposed delivery of advanced calling features by interconnecting various networks. Experimental work by SBPC includes fixed microwave signal measurements in the Houston area, development of a prototype IMASS system that is still being refined, a test of the IMASS algorithm, and deployment of two PCS service trials in medical environments. However, SBPC has not demonstrated the technical feasibility of using the IMASS system to share spectrum with existing fixed microwave systems, nor that its system can be used to deploy PCS in a real world environment. Additionally, SBPC's proposal to offer advanced calling features by interconnecting existing networks does not justify a preference because similar calling features already are offered the public. Accordingly, we deny SBPC's pioneer's preference request.

139. *Tel/Logic, Inc. (Tel/Logic) (PP-18).* Tel/Logic requests a pioneer's preference based on its overall contributions to PCS system design and service concepts that focus on providing PCS to the medical community. Tel/Logic states that its innovations include specifying key functionality requirements and operating characteristics, identifying a mechanism for the coordination and control of multiple micro cells, developing an intelligent feature set needed to ensure full user functionality, and setting user and alternative mobile service integration and interoperability design objectives. Tel/Logic states that it plans to test a distributed and hierarchical control system that permits local control and interconnection; a distributed antenna system to provide effective, widespread radio propagation within buildings; and an intelligent signalling interface to provide flexible, useful, and non-intrusive call control to mobile users. Tel/Logic states that in designing its PCS service it will use equipment and technology developed by others.

140. GTE opposes Tel/Logic's request for a pioneer's preference, stating that its proposal is no more than a concept or design and thus is not innovative. GTE also argues that Tel/Logic is not making a serious development effort.[147]

141. In reply, Tel/Logic asserts that its status as an innovator is evidenced by the press attention it has received for its approach to medically-based PCS.[148] Tel/Logic asserts that its developmental efforts have been serious, although limited by lack of resources. It suggests that the Commission reiterate the philosophy incorporated in the pioneer's preference rulemaking, which requires neither actual testing of all experimental aspects of an applicant's proposal, nor demonstrations of immediate financial capacity. Tel/Logic also suggests that the Commission recognize the decentralized nature of PCS development, and for smaller companies in particular, assess the contribution, not necessarily the completeness, of each pioneer's effort in relationship to its resources.

142. In the *Tentative Decision* we proposed to deny Tel/Logic a preference for failure to submit either the preliminary results from an experiment or a sufficient showing of technical feasibility. Tel/Logic responds that the technical feasibility of its proposal was adequately demonstrated in its original preference request, which it maintains clearly demonstrated the analogous use of related technologies in other communications applications.[149] It also maintains that its subsequent developmental work provides more than sufficient support for a claim of the significant innovation and technical feasibility of its system requirements as initially proposed. Tel/Logic concludes that its subsequent experimental efforts are fully documented in its quarterly progress reports, and that no arguments were received questioning the feasibility of its technical innovations.

143. We find that Tel/Logic has not clearly demonstrated the technical feasibility of its proposed concept and system design, and has not provided any additional information to demonstrate an innovative contribution in PCS technology to warrant the grant of a pioneer's preference. Although in its application for a preference it stated that it had developed a method of coordination and control of micro-cells and developed intelligent features that are new and innovative, it did not describe these features with particularity nor demonstrate the new and innovative nature of them either in its application or in later filings with the Commission. Further, Tel/Logic states that its technical proposal is analogous to other proposed systems. We conclude that Tel/Logic has not demonstrated a working PCS system that incorporates new or innovative communications technologies. Accordingly, we deny Tel/Logic's request for a pioneer's preference.

144. *US West NewVector Group, Inc. (NewVector)(PP-19).* In its pioneer's preference request, NewVector states that based on its experience with PCS-type systems in the United Kingdom it could provide valuable data to the Commission. In particular, NewVector argues that a shared

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145 *See* SBPC at 4-6 (January 29, 1993).
146 *See* Attachment A of APC Reply at 47-48 (March 1, 1993).
147 *See* GTE at 8 (January 24, 1992).
148 *See* Tel/Logic Reply at 8 (February 7, 1992).
149 *See* Tel/Logic Reply at 5 (January 29, 1993).

infrastructure with another PCS provider is the basis for a cost effective PCS system. However, NewVector does not describe a specific PCS proposal in its preference request.

145. PacTel comments that the NewVector preference request discusses no technology, requests no spectrum band, describes no service, and merely states that NewVector has gained some experience in the United Kingdom. In our *Tentative Decision* we proposed to deny NewVector's request, stating that NewVector did not demonstrate the feasibility of its technology or demonstrate the capabilities or possibilities of a specific identifiable PCS technology or service or brought it to a more advanced or effective state. NewVector did not respond to the *Tentative Decision*. Accordingly, we deny NewVector's request for pioneer's preference.

146. *Vanguard Cellular Systems, Inc. (Vanguard) (PP-20).* Vanguard requests a pioneer's preference based on its use of microcell technology in the context of multiple, connected switches serving wide-area cellular markets. Vanguard states that it would use spread spectrum technology to achieve spectrum efficiency and argues that its focus on smaller markets is innovative in comparison with other proposals for large metropolitan areas.

147. PacTel state that others have done work similar to that of Vanguard's and that Vanguard should not be awarded a preference since it has not demonstrated an innovative system.[150] We proposed to deny Vanguard a pioneer's preference request in the *Tentative Decision* because of Vanguard's failure to demonstrate the technical feasibility of its proposed system. Vanguard did not respond to the *Tentative Decision*. Accordingly, we deny Vanguard's request for pioneer's preference.

148. *Sharecom-Austin, L.P. (Sharecom-Austin) (PP-26).* Sharecom-Austin requests a pioneer's preference for proposing to interconnect a PCS system with a shared tenant system, such as in a high density office building. However, Sharecom-Austin does not offer any technical specifics of its system, but merely indicates its goal of testing the interface.

149. In the *Tentative Decision*, we proposed to deny Sharecom-Austin's request for pioneer's preference for failing to submit either the preliminary results from an experiment or a sufficient showing of technical feasibility. Sharecom-Austin did not respond to the *Tentative Decision*. Accordingly, we deny Sharecom-Austin's request for pioneer's preference.

150. *Time Warner Telecommunications, Inc. (PP-27).* Time Warner requests a pioneer's preference for its proposal to combine cable television facilities with an integrated radio overlay in the 2 GHz band. Time Warner states that it is entitled to a pioneer's preference based on its signal propagation tests, experiments with remote antenna drivers, and experiments with digital transport carrier (DTC) systems using existing "live" cable facilities.[151]

151. Time Warner conducted tests of the Nexus 800 MHz RAD, tests of a DTC system to transport signals back to the headend, and 2 GHz propagation tests. The RAD tested is a CT-2 system in which a base station located at the cable headend communicates or "drives" remote antennas connected to cable lines. The same frequency is used in all microcells with no handoff between them. DTC tests explored communicating between a PCS base station and the cable headend by modulating digital signals. The DTC method converts analog telephone voice signals to digital, multiplexes them with other control and communications signals, and modulates them onto RF carriers. This method increases capacity between the PCS base station and cable headend by digitally combining multiple signals. Time Warner's propagation tests were conducted to verify that 2 GHz frequencies could support wireless services and to determine achievable coverage areas. While tests confirmed that 2 GHz frequencies could support wireless service, they indicated that higher power base stations may be required to achieve coverages equivalent to those of 800 MHz cellular service.[152]

152. In comments to Time Warner's pioneer's preference request, GTE argues that Time Warner's showing of technical feasibility is insufficient. GTE further claims that Time Warner is basing its preference request on the unsupported assumption that cable television facilities would be cost-effective for the backhaul of CT-2 communications.[153] PacTel also questions the technical feasibility of Time Warner's proposal and additionally argues that developments that pertain only to the cable industry do not merit a preference.[154]

153. Time Warner objects to GTE's and PacTel's characterizations that cable-related proposals are undeserving of a preference on the grounds that proposals to use existing infrastructures are not innovative. Time Warner argues that its remote antenna proposal merits a preference because implementation of the proposal will reduce the need for numerous high-powered base stations.[155] Further, Time Warner argues that its proposal meets the Commission's standard for a preference because, *inter alia*, it would provide added functionality and reduced costs.[156]

154. In the *Tentative Decision* we proposed to deny Time Warner a preference, finding that its proposal did not appear to be innovative. Time Warner responded to the *Tentative Decision*, stating that the Commission failed to recognize the pioneering importance of its experimental work. Time Warner claims that although other companies developed PCS/cable plant interfaces, its combination of work in PCS/cable integration has been superior. It claims credit for being the first to test the remote antenna system concept on live, pre-existing subscriber hybrid fiber/coaxial cable facilities and the first to test and demonstrate alternative cable-based transport configurations combining broadband remote antenna and narrowband DTC architectures on live, pre-existing subscriber hybrid fiber/coaxial cable facilities.[157]

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150 *See* PacTel at 20 and GTE at 8 (January 24, 1992).
151 *See* Time Warner Reply at 40 (June 25, 1992).
152 *See* Time Warner Supplement to Request for Pioneer's Preference at 8 (May 4, 1992).
153 *See* GTE at 21 (June 10, 1992).
154 *See* PacTel at 23 (June 10, 1992).
155 *See* Time Warner Reply at 17 (June 25, 1992).
156 *Id.* at 18.
157 *See* Time Warner at pp. i-ii (January 29, 1993).

155. In its reply comments, Time Warner argues that no party disputes its claim to being the first to test and modify the Nexus RAD system. Further, it states that the Commission should reject arguments that preference awards be based on filing dates of experimental licenses.[158]

156. Time Warner's work with propagation testing, the remote antenna concept, and DTC appear to have consisted of planning and integration of existing equipment and carrier modulation methods with the cable infrastructure. Time Warner does not identify any specific development for which it is responsible except for 2 GHz propagation tests that appear to be little different from those performed before it by numerous parties. Time Warner has not identified or explained any specific innovation or development that merits a preference. The concept of using the cable infrastructure as a backbone for PCS in and of itself does not merit a pioneer's preference; nor does performing propagation tests or tests of existing equipment. Time Warner does not argue that its testing of the Nexus CT-2 RAD system led to a significant modification, service enhancement, or added capability. Accordingly, we deny Time Warner's pioneer's preference request.[159]

157. *Adelphia Communications Corp. (Adelphia) (PP-41).* Adelphia requests a pioneer's preference for its efforts to develop "Neutral Networks." According to Adelphia, these networks will allow a cable coaxial plant to be modified for bi-directional signal transmission to provide PCS.

158. In comments to Adelphia's preference request, PacTel argues that this concept is not innovative. Similarly, GTE contends that Adelphia's proposal does not advance the radio portion of PCS technology.[160] We proposed to deny Adelphia a preference, concluding in the *Tentative Decision* that its proposal was preceded by the efforts of Cox in proposing integration of cable facilities and PCS. Adelphia did not respond to the *Tentative Decision*. Accordingly, we deny Adelphia's pioneer's preference request.

159. *Advanced MobileComm Technologies, Inc. (AMT) and Digital Spread Spectrum Technologies, Inc (PP-42).* In a consolidated filing, AMT and DSST each request a separate pioneer's preference for their proposal of an "open entry" architecture in which any PCS applicant that meets certain requirements may gain access to a block of spectrum.[161] This architecture would provide each licensee one 5 megahertz channel for exclusive access, with the remaining channels (also 5 megahertz) being dynamically available to all licensees in real time on an FDMA basis. DSST's equipment uses Direct Sequence CDMA, which it calls Synchronous CDMA (S-CDMA), to emphasize the synchronization of the inbound and outbound signals that is necessary because its inbound and outbound signals use TDD on the same channel. AMT and DSST assert that they deserve a preference for their open entry architecture combined with FDMA/S-CDMA/TDD equipment in a microcell and picocell environment. AMT and DSST's proposed services include cordless phone, private branch exchanges (PBXs), and wireless local area networks (LANs).

160. Qualcomm states that DSST utilizes orthogonal spreading codes that were pioneered by Qualcomm[162] and that DSST's use of lower orthogonal signaling to preserve the orthogonal space will result in loss of demodulation efficiency. Qualcomm also claims that DSST's system has at least three times lower capacity than Qualcomm's because Qualcomm uses a higher rate speech coder. Qualcomm further contends that DSST omits the use of forward error correction codes in the base-to-mobile link and that this omission lowers the link's capacity and quality. Qualcomm also asserts that DSST's system is designed for pedestrian use, but that DSST's slower power control may not be adequate for such systems.

161. GTE states that AMT's proposals are unproven and lack a sufficient showing of technical feasibility, particularly with respect to interference with existing microwave users.[163] PacTel asserts that AMT's and DSST's work is still in a preliminary stage and is for non-licensed Part 15 service, and therefore does not merit a preference.[164] CTP asserts that DSST's "open entry" proposal for PCS is not new -- rather, both CT-2 in the U.K. and CT-2 Plus in Canada provide for multiple entrants with dynamic channel allocation.[165]

162. AMT and DSST respond to Qualcomm's comments, asserting that the criticisms are flawed because they are based on Qualcomm's technical choices for its digital cellular system.[166] They assert that the needs for a PCS market will be different than those for a digital cellular market and that accordingly, different technical choices must be made.[167] AMT and DSST maintain that they chose their 5 megahertz channeling scheme because it is more suited to spectrum sharing with fixed microwave systems. They also disagree that they derived their technology from CTP and assert that GTE and PacTel offer only unsupported and erroneous claims.

163. In the *Tentative Decision*, we tentatively denied AMT and DSST a preference because: 1) AMT had just begun to initiate preliminary tests of British equipment and DSST had performed only computer simulations and spectrum studies, and neither party had developed 2 GHz PCS technology to the point of field testing; and 2) The spectrum scheme proposed in the PCS *Notice* was substantially different from the AMT/DSST open entry proposal.

164. In comments to the *Tentative Decision* AMT and DSST assert that they have commercially available spread spectrum equipment that operates in the 900 MHz, 2.4 GHz, and 5.7 GHz ISM bands. DSST indicates that it is still developing its S-CDMA technology that will operate in the 2 GHz band, but states that the technology will be similar to that being commercially used by DSST customers in the

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158 *See* Time Warner Reply at iii (March 1, 1993).

159 While we concur with Time Warner that pioneer's preferences should not be granted based on experimental license filing dates *per se*, we do consider it appropriate to consider timing when differences are significant. We base preference grants on demonstrated accomplishments, and adhere to this policy in the instant proceeding.

160 *See* PacTel at 24 and GTE at 16 (January 24, 1992).

161 *See* AMT/DSST at 2-3 (May 1, 1992).

162 *See* Qualcomm at 7-10 (June 10, 1992).

163 *See* GTE at 12 (June 10, 1992).

164 *See* PacTel at 28 (June 10, 1992).

165 *See* CTP at 15 (June 10, 1992).

166 *See* AMT/DSST Reply at 7 (June 25, 1992).

167 For example, AMT and DSST state that Qualcomm's system was designed for large cells with high speed handoffs from users traveling at vehicular speeds, while AMT's and DSST's proposed service is microcellular-based to provide low cost service in densely populated areas to subscribers at pedestrian speeds.

ISM bands at 900 MHz and 2.4 GHz.[168] AMT and DSST also assert that their open entry spectrum proposal may be different from that proposed in the *Notice* but that it is compatible. They contend that S-CDMA will function well within other licensing regimes and that the Commission is penalizing them because they request a 5 megahertz frequency assignment rather than a 30 megahertz assignment. In reply comments to the *Tentative Decision* AMT and DSST assert that they are the only preference applicant to describe efforts focused on the development of a PCS architecture suitable for deployment of wireless PBXs and LANS.

165. It appears that AMT's and DSST's proposals contain two possibly innovative developments: 1) open entry architecture and 2) use of FDMA/S-CDMA/TDD equipment at 2 GHz. However, in the PCS *Second Report and Order* we did not adopt their open entry architecture proposal, and we find that this proposal is incompatible with the spectrum scheme adopted because only one license per spectrum block per service area may be granted.

166. With respect to AMT's and DSST's 2 GHz equipment, at the time of the *Tentative Decision* we found that AMT and DSST had failed to demonstrate the technical feasibility of this equipment. We continue to believe that AMT and DSST have failed to demonstrate the equipment's technical feasibility. Further, no additional information has been submitted by AMT and DSST that they have made significant modifications to their technology to provide PCS services at 2 GHz. Accordingly, we deny AMT's and DSST's pioneer's preference requests.

167. *American Telephone and Telegraph (AT&T) (PP-43).* AT&T proposes to use the 6 GHz band to provide PCS. In the *Tentative Decision,* we proposed to deny this request since the 6 GHz band is not the subject of this proceeding. AT&T did not respond to the *Tentative Decision.* In our PCS *Second Report and Order* we did not allocate spectrum for PCS at 6 GHz. Accordingly, we deny AT&T's pioneer's preference request.

168. *American TeleZone (TeleZone) (PP-44).* TeleZone proposes a wideband CDMA PCS system that will include sharing with other PCS subscribers utilizing a Part 15 (unlicensed) spectrum approach to support its system. In comments to Telezone's pioneer's preference request, PacTel and GTE object to a grant of a preference to Telezone due to failure to demonstrate a technically feasible system.[169]

169. The Commission found in its *Tentative Decision* that TeleZone's system did not comply with the proposed PCS rules and thus was not eligible for a preference because the system would require a total bandwidth of 80 megahertz. TeleZone did not respond to the *Tentative Decision.* Since the rules adopted in the PCS *Second Report and Order* do not permit 2 GHz PCS licensees to use more than 40 megahertz of spectrum in a geographic area,[170] the rules are inconsistent with the TeleZone proposal. Accordingly, we deny TeleZone's pioneer's preference request.

170. *Ameritech (PP-45).* Ameritech requests a pioneer's preference for having developed an open network interface between the PSTN and a PCS provider that it contends is innovative because it is independent of transmission technology, employs "intelligent" handset/base station interaction, and offers PCS providers a range of features to offer their customers.[171] The proposed system supports two-way voice and data communications and handoff between the handsets and the cellular base stations connected to the existing PSTN. In addition, Ameritech claims credit for innovation for the first comparative testing of sharing spectrum between fixed microwave operations in the 2 GHz PCS band using FDMA, CDMA, and TDMA technologies; implementing "frequency agile" spectrum sharing; and developing new PSTN capabilities and technologies to facilitate PCS. Ameritech further asserts that its contract with Omnipoint, which was tentatively granted a preference, initiated the development of the first 2 GHz PCS handsets using FDMA, CDMA, and TDMA technologies.[172]

171. In comments on Ameritech's request, PacTel argues that Ameritech has not demonstrated innovation. PacTel asserts that Ameritech has borrowed from others, but has not demonstrated that it has contributed significantly to the development or refinement of PCS.[173] Further, PacTel states that Ameritech has merely contributed specifications to Motorola for handset development.[174] For these reasons, PacTel concludes that Ameritech does not merit a preference. GTE concurs, stating that although Ameritech has been testing technology and conducting market tests for over a year, Ameritech's contributions to PCS are inconclusive.[175]

172. In reply, Ameritech states that its market/technical trial design, open network interface approach, related developments to the PSTN, commissioning of PCS handsets, and wide-scale market test demonstrate its merit for a preference.[176] It argues that it has carefully detailed its proposal in its license application, experimental reports, and pioneer's preference request.[177]

173. In our *Tentative Decision* we proposed to deny Ameritech a preference, finding that its proposal appeared to constitute a compilation or aggregation of existing communications technologies or systems, or did not constitute a unique or innovative technology or service proposal.

174. In response to the *Tentative Decision,* Ameritech argues that its proposed system is not a compilation or aggregation of existing technologies, but rather is a "new and open network system architecture" that: 1) employs distributed intelligence between base station, handset and switching system to allow the base station and handset to direct the PSTN to handoff calls and 2) can utilize existing PSTN network technologies in new ways as elements of the PCS system.[178] Further, Ameritech claims credit for helping Omnipoint develop its 1900 MHz handset because it provided the general specifications for the manufacturing contract and allowed Omnipoint to develop handsets under Ameritech's experimental license.[179] Ameritech contends

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168 *See* DSST Report at 2 (January 11, 1993).
169 *See* PacTel at 20 and GTE at 12 (January 24, 1992).
170 *See Second Report and Order, supra* note 10, 8 FCC Rcd at 7813.
171 *See* Ameritech Request at 8 (May 4, 1992).
172 *Id.* at 2.
173 *See* PacTel at 21 (June 10, 1992).
174 Ameritech contracts with both Omnipoint and Motorola for handsets.
175 *See* GTE at 8 (June 10, 1992).
176 *See* Ameritech Reply at 3 (June 25, 1992).
177 *Id.* at 5.
178 *See* Ameritech at 6 (January 29, 1993).
179 *Id.* at 7.

that its unbundled PSTN structure is a significant communications innovation because it allows PCS providers access to the functionalities of the PSTN.[180]

175. We conclude that Ameritech has not demonstrated that it is employing other than existing technology for its system and that it has not demonstrated its responsibility for a specific innovation. Ameritech has not demonstrated how its claimed enhancements to the PSTN and development of an open network interface differs from the capabilities of the existing PSTN. In addition, Ameritech has not submitted results of comparative testing of PCS radio access technologies. Further, although Ameritech refers to frequency agile handsets and base stations, its documentation lacks technical details and explanation. Finally, while Ameritech states that it "provided general specifications" to Omnipoint and Motorola for the design of 1900 MHz handsets,[181] it does not explain with particularity its innovative contribution to the design of those handsets. From the record we are unable to ascertain whether Ameritech developed a specific functionality that Omnipoint or Motorola implemented in their handsets or defined specific criteria for a universal interface. Accordingly, we deny Ameritech's request for a pioneer's preference.

176. *Bell Atlantic Personal Communications, Inc. (PP-46).* Bell Atlantic requests a pioneer's preference based on two independent but complementary proposals for PCS systems that it names the "Personal Line" system and "Beacon telepoint" system. As described by Bell Atlantic, the Personal Line system employs one personal number and one handset that is usable in multiple environments: home/office, pedestrian, and vehicular.[182] Bell Atlantic states that its handset is capable of initiating calls and employs a built-in pager to notify the user of incoming calls. Bell Atlantic's proposed system consists of private base stations, PBXs, public microcells, and public macrocells. Personal Line would route outgoing calls using technology that scans for the nearest base station, then microcell, then macrocell, depending on the handset's location. According to Bell Atlantic, the key to Personal Line is its Locator Service that provides person-centered, rather than location-centered, communications.[183]

177. The Locator Service (Beacon) telepoint system proposes to overcome the problems that Bell Atlantic contends exist with current telepoint systems, such as locating an operating site within which a handset may function.[184] The Beacon telepoint transmits a signal (at powers as high as 5 watts) to enable the network to signal on an alphanumeric display the nearest telepoint.[185] The Beacon system consists of a low power signal at the telepoint, and a high power signal with a range of approximately 10 miles.[186]

178. In comments to Bell Atlantic's pioneer's preference request, PacTel states that the Personal Line proposal should be considered carefully because it can bring a rudimentary form of PCS to the public in the near future and that the Beacon system is an innovative enhancement of a CT-2 system that solves the problem of locating a base station to place a call.[187] However, GTE asserts that Bell Atlantic's PCS integration efforts have not yet been tested successfully, and argues that system technical feasibility has not been demonstrated.[188] PageMart asserts that Bell Atlantic's proposal: (1) contemplates a massive increase in infrastructure investment;[189] (2) is not compatible with cordless telephones and does not support a universal handset usable while traveling from home to office;[190] (3) maximizes airtime by delivering calls over the radio spectrum;[191] and (4) utilizes a massive database that registers the user's location, raising privacy concerns.[192]

179. In reply comments, Bell Atlantic argues that it provided a technical feasibility showing in its original filing.[193] Further, Bell Atlantic states that PageMart's comments are misplaced because: (1) infrastructure investment will be required regardless of whether Locator Service is offered;[194] (2) Personal Line supports a universal handset that operates with base stations superior to present cordless phones, and the handset may be used with microcells for pedestrian speeds and in the existing cellular environment for vehicle speeds;[195] (3) Personal Line minimizes air-time because calls are delivered by the wireless network if the recipient is within a wireless environment; otherwise, if the user is registered with the wireline network calls are delivered via wireline; and (4) the exact location of the user is known only in wireline registration and in wireless networks only the cell or microcell that the user is utilizing is known to the database. Bell Atlantic states that the latter technique is the same one used by cellular radio systems and therefore should not raise privacy concerns.[196]

180. In the *Tentative Decision* we proposed to deny Bell Atlantic's request for a preference, finding that its proposal constitutes a compilation or aggregation of existing communications technologies or systems or does not otherwise constitute a unique or innovative technology or service proposal. Bell Atlantic responded to the tentative denial, requesting clarification as to why it was denied a preference for and argues that neither reason given is an accurate assessment of its proposal. Bell Atlantic asserts that Personal Line is innovative and merits a preference because it is the first time that the intelligence and signalling of the public network have been combined with the portability of a wireless network to create a person-centered communications system.[197] Further, it argues that its Locator Service (Beacon) also merits a preference because it allows customers to maintain a single personal phone number and employs sophisticated call-routing capabilities.[198]

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180 *Id.* at 8.
181 *See* Ameritech Request at 12 (May 4, 1992).
182 *See* Bell Atlantic Request at 7 (May 4, 1992).
183 *Id.* at 5.
184 *Id.* at 18.
185 *Id.* at 19.
186 *Id.* at 26.
187 *See* PacTel at 10 (June 10, 1992).
188 *See* GTE at 8 (June 10, 1992).
189 *See* PageMart at 8 (June 10, 1992).
190 *Id.* at 9.
191 *Id.*
192 *Id.* at 10.
193 *See* Bell Atlantic Reply, note 1 (June 25, 1992).
194 *Id.* at 5.
195 *Id.* at 6.
196 *Id.* at 7.
197 *See* Bell Atlantic at 4 (January 29, 1993).
198 *Id.*

181. We agree with PacTel that the Beacon telepoint system potentially could improve existing CT-2 systems; however, we find that it does not constitute an innovative proposal for PCS. Further, if Bell Atlantic's Personal Line system provides ubiquitous coverage as Bell Atlantic states it will, its Beacon system appears unnecessary.[199] In any event, Bell Atlantic has not demonstrated the technical feasibility of its Personal Line system. Bell Atlantic's pioneer's preference request and experimental reports indicate that this system is only in the developmental stage. The record lacks critical technical details such as spectrum requirements, modulation technique, power levels of handsets and microcells, ability to coexist with existing fixed operational microwave users, and channeling scheme. Bell Atlantic has not explained the specific aspects of its system of base stations, microcells, and macrocells that it states differ significantly from the proposals of other parties, why those aspects are innovative, and what Bell Atlantic's contribution is for having designed or developed the equipment that results in those functions being available. Accordingly, we deny Bell Atlantic's pioneer's preference request.

182. *Broadband Communications Corporation (Broadband) (PP-47).* Broadband requests a pioneer's preference for a PCS system designed to provide service over fixed links to residential and small business using wideband CDMA technology and a fast packet overlay that it calls multiple division multiple access (MDMA). Broadband's proposed system requires 140 megahertz of spectrum (70 megahertz spread spectrum in each direction).

183. In comments to Broadband's pioneer's preference request, PacTel contends that Broadband does not deserve a preference because its proposal will merely replace the exchange carrier's local loop and will not provide mobile service. Further, PacTel argues that Broadband is proposing a wideband service that does not comply with the Commission's rules.[200] GTE states that the Broadband proposal does not offer sufficient detail to justify a preference. In the *Tentative Decision* we proposed to deny Broadband's preference request, concluding that Broadband did not demonstrate the technical feasibility of its system or that it had developed the capabilities or possibilities of a specific identifiable PCS technology or service or had brought it to a more advanced or effective state. Broadband did not respond to the *Tentative Decision*. Because Broadband has not provided sufficient information to demonstrate the technical feasibility of its proposed PCS or MDMA concept, and also because its wideband system is inconsistent with the spectrum plan we adopted in the PCS *Second Report and Order*, we deny its pioneer's preference request.

184. *Cable USA, Inc. (PP-48).* Cable USA requests a pioneer's preference for its proposal to utilize Multipoint Distribution Service (MDS) spectrum and MDS and cable television facilities as a network distribution infrastructure for PCS.[201] It argues that this approach will promote spectrum efficiency, enhance both PCS and MDS systems, and bring PCS to areas that lack traditional network facilities. It claims that its proposal would provide affordable PCS to customers through its novel MDS-based approach, particularly in small markets. In Cable USA's PCS system, MDS would serve as the backbone for linking microcells. Within microcells, RADs would provide coverage to specific local areas and microcell extenders would expand coverage.

185. In comments on Cable USA's request, GTE argues that Cable USA has not demonstrated the technical feasibility of its proposal.[202] PacTel notes that in small markets typically there is ample spectrum available; likely there will be low demand for PCS in these areas; and that in any event backhaul is only a small part of a complete PCS system in these low density population areas.[203] Cable USA responds that it expects to submit test results in the near future and that use of the cable and wireless cable infrastructure is particularly well-suited for rural PCS use because of inherent economies of scale.[204]

186. In the *Tentative Decision* we proposed to deny Cable USA a pioneer's preference for failure to submit either the preliminary results from an experiment or to demonstrate technical feasibility. In response to the tentative denial, Cable USA argues that the pioneer's preference rules require only that an experimental license application be filed, not that results be reported, and states that it complied with this requirement by filing an experimental license application in 1991. Cable USA contends that it received the license, revised and finalized its plans for testing MDS and cable wire systems for PCS infrastructure, hired a PCS test coordinator, filed a preliminary progress report, and renewed its license in November, 1992.

187. We find that while Cable USA filed an experimental license application it did not file preliminary results from this experiment or an adequate showing of technical feasibility, as is required by our rules.[205] At the time of the *Tentative Decision*, Cable USA had neither acquired equipment nor tested its network design.[206]

188. In addition, Cable USA has not with specificity proposed a new or innovative service or technology, nor its responsibility for any specific aspect. While it is the only pioneer's preference applicant to propose using MDS spectrum as a backbone for PCS, we did not provide for this use in the PCS *Second Report and Order* and note that large numbers of applications for MDS licenses are pending for non-PCS "wireless cable" services. Additionally, we note that thousands of microwave links that can serve as PCS backbone systems are located above the channels allocated to MDS.[207] Accordingly, we deny Cable USA's pioneer's preference request.

189. *Cellular Service, Inc. (Cellular) (PP-49).* Cellular seeks a pioneer's preference for a narrowband digital personal communications service based on the European "Digital Communications Service 1800" technology.

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199 *Id.*

200 *See* PacTel at 16 (June 10, 1992).

201 *See* Cable USA Request for a Pioneer's Preference (May 4, 1992).

202 *See* GTE Comments at 18 (June 10, 1992).

203 *See* PacTel at 25 (June 10, 1992).

204 *See* Cable USA Reply at 2 (June 25, 1992).

205 *See* 47 C.F.R. § 5.207.

206 *See* Cable USA Progress Report, filed June 18, 1992.

207 In the emerging technologies proceeding, we reallocated for use by private and common carrier fixed microwave systems the 3.7-4.2 GHz band, and reallocated and rechannelized for such use the 5.925-6.425, 6.525-6.875, 10.565-10.615/10.630-10.680, and 10.7-11.7 GHz bands. *See Second Report and Order*, ET Docket No. 92-9, *supra* note 136. These and other existing fixed microwave bands above 11.7 GHz are available for various types of fixed microwave use, including PCS backhaul.

190. In comments on Cellular's pioneer's preference request, PacTel argues that Cellular has not developed a new service but merely duplicated an existing service.[208] In the *Tentative Decision* we proposed to deny Cellular's proposal's because it is a compilation of existing communications technologies or systems. Cellular did not respond to the *Tentative Decision*. Accordingly, we deny Cellular's pioneer's preference request.

191. *Comcast PCS Communications, Inc. (Comcast) (PP-50).* Comcast requests a pioneer's preference for its proposed integration of cellular, cable, and PCS networks. Comcast proposes to provide low cost PCS service by interfacing its cellular switching office with its cable television headend via a cellular/PCS base station, and to utilize fiber for backhaul between its PCS remote antenna sites. Comcast states that its cable facilities will provide the backbone infrastructure, locations for microcells, and access technology for signal transportation. Its cellular facilities would provide switching, billing, roaming, automatic call delivery, and customer services. Further, Comcast states that the existing cellular service can be accessed to provide macrocell coverage when not within PCS microcell range.[209]

192. In comments on Comcast's pioneer's preference request, GTE claims that Comcast's experimental efforts do not demonstrate innovation deserving a preference.[210] PacTel states that Comcast's proposal does not merit a preference because its proposed system limits PCS to cellular carriers with access to cable company fiber.[211] Further, PacTel asserts that Comcast's frequency sharing scheme limits technologies to those that lend themselves to Comcast's specific channelization scheme. Finally, PacTel argues that Comcast could provide its proposed service within its existing authorizations as a cellular carrier. Bell Atlantic contends that various cable company proposals, including Comcast's, are only novel to the cable industry and are not innovative from an overall telecommunications perspective.[212]

193. In its reply comments, Comcast responds to GTE, stating that its proposal is to use its cable network as a backbone for telecommunications links to PCS and that its proposal to use modified cellular base stations for microcell coverage are an innovative use of this infrastructure and meet the pioneer's preference criteria for advancing technology or services. Comcast also addresses the arguments of PacTel, stating that its system does not limit PCS to existing cellular carriers, but demonstrates one way that a cable/cellular interface can advance PCS. Comcast further argues that its use of a wideband cable/cellular interface does not fall within its current cellular authorizations, and that it would provide a unique non cellular service. Comcast concludes that its PCS system demonstrates enhancements to cellular service and would be a new use for spectrum.[213]

194. In our *Tentative Decision* we proposed to deny Comcast a preference because, although the request proposes efficient use of cable facilities to provide PCS, Cox appears to have first proposed such cable/PCS integration, developed the necessary hardware, and conducted at least preliminary field trials with actual hardware.

195. In response to the *Tentative Decision* Comcast argues that we did not address its integration of existing cellular services with cable TV, innovative PCS achievements, or associated experimentation with wireless/wireline interface. Comcast argues that the combined cable/cellular infrastructure provides the ideal environment for cost-effective PCS. Further, Comcast asserts that its experiments at cellular frequencies demonstrate the feasibility of its PCS system because its concept for PCS involves the sharing of the cellular and PCS infrastructures by a PCS licensee. Finally, Comcast claims that a five-way, intrastate, interstate, and trans-Atlantic conference call linking three cities on September 10, 1992, proves its technology as an alternative to using local exchange carriers.[214]

196. We find that Comcast has not demonstrated the feasibility of its system or demonstrated innovation with respect to PCS. Comcast has demonstrated enhancements to its cellular system by interfacing its cellular network with the fiber network used by its cable facilities. While Comcast's experimental reports address propagation tests at 2 GHz, it has submitted no information related to experiments with PCS or other equipment at 2 GHz. Rather, Comcast appears to rely upon microcell and picocell tests using cellular equipment operating in the 800 MHz range. Many of Comcast's claimed PCS achievements relate to cellular service, rather than PCS service at 2 GHz, and appear to demonstrate that fiber interface can be provided without access to additional spectrum. Under Comcast's proposal, cable facilities would provide the backbone infrastructure and access technology for PCS, and cellular facilities would provide the billing, switching, macrocell coverage, roaming, call delivery, and customer services. We conclude that fiber interface by itself is not innovative and does not merit a preference. Accordingly, we deny Comcast's pioneer's preference request.

197. *Corporate Technology Partners (PP-51).* CTP requests a pioneer's preference for its Interference Sensing CDMA technology that it claims is the adaptation to narrow channel CDMA of its interference sensing developed for CT-2 Plus. ISCDMA combines narrow-channel CDMA technology with interference sensing dynamic channel allocation. In ISCDMA the base station scans available channels and selects those that have signal levels below a set threshold. The base station then sends a list of the channels that have sufficiently low noise to the mobile unit, and the mobile unit scans the channels on the list and from the list selects a channel with an appropriately low noise level for communications with the base station. The mobile and the base station also can dynamically switch channels if interference appears on the selected channel. CTP claims that ISCDMA increases channel capacity while avoiding interference to fixed microwave operations and other PCS users. It states that ISCDMA can be implemented with minor software modifications to available CDMA equipment and that this technology permits PCS operations on a secondary basis to existing microwave operations, instead of PCS displacing

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208 *See* PacTel at 21 (January 24, 1992).
209 *See* Comcast Request at 22 (May 4, 1992).
210 *See* GTE at 16 (June 10, 1992).
211 *See* PacTel at 25.
212 *See* Bell Atlantic at 11 (June 10, 1992).
213 *See* Comcast Reply at 2, 4 (June 25, 1992).
214 *See* Comcast at 3 *et seq.* (January 29, 1993).

microwave incumbents. CTP also claims that its interference sensing is innovative because to avoid interference both the base stations and handsets scan a channel before using it.[215] It proposes PCS services that include two-way voice and data transmissions in an architecture that includes wireless local loop, cordless residential telephone, wireless PBX, and public base station services.

198. CTP maintains that it is the first company to pursue PCS development in the United States by its formation of Easyphone, Inc. with Bell Canada Enterprises (BCE) in the Fall of 1989.[216] However, CTP states that in August 1991 it conveyed to BCE its ownership interest in Easyphone and its frequency sharing CT-2 invention.[217] CTP contends that ISCDMA was invented in November 1990, which it says is before other applicants proposed similar approaches. CTP states that the factors essential for utilization of its interference sensing approach are basic components of existing CT-2 and CT-2 Plus systems, and that adoption by the Canadian Department of Communications of CT-2 Plus as a national Canadian standard for the first generation of microcellular PCS has confirmed the feasibility of the interference sensing approach.[218]

199. Qualcomm asserts that CTP did not invent the CDMA system for which it claims credit and that Qualcomm has several patents covering this system.[219] Qualcomm further states that while CTP may have developed techniques to monitor interference and dynamically allocate frequency channels, others have developed similar ideas.

200. PacTel states that ISCDMA potentially is a useful development, but that no experimental tests have been done, that technical feasibility is not demonstrated, and that the proposal otherwise is undistinguished.[220] PacTel concludes that a preference should not be given for a single untested idea. Similarly, GTE states that CTP's proposal is a combination of proven and promised functionality that has not been shown to be technically feasible.[221] GTE also asserts that there has not been a showing of significant investment of effort, either in terms of experimentation or demonstration of technical feasibility.

201. Viacom states that CTP's proposal is based on highly questionable propagation reciprocity that incorrectly assumes that instantaneous propagation measurements from microwave transmitters represents the propagation conditions to microwave receivers that often are separated by 80 megahertz.[222] Viacom asserts that such measurements do not accurately represent interference to microwave operations. Viacom also asserts that CTP incorrectly assumes that measurements from an elevated, high gain antenna at a fixed PCS base station is pertinent with regard to the propagation situation for randomly distributed PCS mobiles in the vicinity.

202. In its comments, CTP states that AMT/DSST, APC, Associated, Pacific Bell and others all derived their proposals from the its work.[223] CTP also argues that it performed innovative work in PCS/passive fiber optic interfaces and PCS/coaxial television interfaces. In its reply comments, CTP argues that its scanning of channels to find a low signal level will protect microwave operations if the threshold level is calculated correctly.[224]

203. In the *Tentative Decision*, we proposed to deny CTP a preference because we found no evidence that APC or others derived their proposals from that developed by CTP. We concluded that APC's FAST technology differs from that of CTP in substantial ways and therefore there was no need to investigate who filed first.

204. In its response to the *Tentative Decision*, CTP states that it should be awarded a preference because its ISCDMA technology is superior to other interference avoidance proposals submitted in this proceeding and because it developed ISCDMA before APC developed FAST.[225] CTP also asserts that even if the Commission perceives FAST to be superior to ISCDMA, this is not a valid basis for denying CTP's pioneer's preference request.[226] Further, CTP argues that it merits a pioneer's preference for its work on interfacing PCS with fiber optic and coaxial cable-based networks.

205. APC argues that CTP's approach is unworkable and that CTP's own technical paper concludes that "further work is needed" to test the proposal's "reliability in an actual PCS environment."[227] APC asserts that ISCDMA would not protect microwave users from interference from PCS licensees and argues that ISCDMA will permit mobiles to use a microwave frequency when the signal is obstructed by terrain or buildings. APC contends that when a subscriber moves from behind a building the microwave operator would suffer interference because while ISCDMA senses interference at call set-up, it does not continuously monitor and adjust frequency use. APC also claims that ISCDMA does not protect microwave operations that use other than an 80 megahertz frequency separation and does not protect receive-only microwave stations. Finally, APC asserts that CTP cannot take credit for the technical filings of Easyphone, Northern Telecom, and Bell Northern Research.[228]

206. CTP claims that its innovations have been entirely original.[229] It also asserts that it is as near to deployment of PCS as the three tentative preference grantees and that a

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[215] CTP's base stations would scan available channels to detect the signal level on each. Channels that have an energy level below a certain threshold, as determined by TIA bulletin 10D and 10E and other factors, would be sent to the mobile. The mobile then would scan the channels and pick the best channel for communications with the base station.

[216] *See* CTP Request at 6 (May 4, 1992).

[217] *Id.* at 7.

[218] *Id.* at 13.

[219] *See* Qualcomm at 5-6 (June 10, 1992).

[220] *See* PacTel at 28 (June 10, 1992).

[221] *See* GTE at 12 (June 10, 1992).

[222] *See* Viacom at 10, 19 (June 10, 1992).

[223] *See* CTP comments (June 10, 1992).

[224] *See* CTP Reply at 13 (June 25, 1992).

[225] *See* CTP at 25 (January 29, 1993).

[226] We agree with CTP that finding one technology to be superior to another is not a basis for denial of a pioneer's preference. However, it does serve as a measure of innovativeness. In any event, as noted below, the conflicting information in the record and lack of demonstrated developments provides an independent basis to deny CTP's request for a pioneer's preference.

[227] *See* APC Reply at 17 (March 1, 1993).

[228] *Id.* at 19-20.

[229] *See* CTP Reply at 1-4 (March 1, 1993).

decision on awarding a preference should be based on progress toward a workable system, not on how much public experimentation has occurred.

207. While CTP may have played a role in the development of interference avoidance technology, we agree with parties who argue that CTP has not demonstrated the feasibility of its proposal. While CTP has provided a theoretical discussion of its technology, it has yet to test its ISCDMA concept or demonstrate whether using it will be effective in preventing interference with existing fixed microwave operations. Additionally, CTP's theoretical discussion concludes that "[f]urther work is needed... to test their reliability in an actual PCS environment."[230] Therefore we do not grant CTP a pioneer's preference for its interference avoidance technology.

208. With regard to CTP's request for a preference for its work on interfacing PCS with fiber optic and coaxial cable-based networks, we note that this was not part of CTP's original request but raised later in its filings on other applicants' requests. In those comments, CTP states that it has engaged in substantial work in the area of fiber optic and coaxial cable interfaces. CTP gives a brief description of work it says it is performing in this regard. However, we find that it has pursued the concept of cable PCS well after other entities and that its filings do not propose or demonstrate responsibility for any new or innovative concept or technology.

209. In conclusion, it appears that CTP has developed only a concept of interference avoidance that it claims can be implemented with any system infrastructure. We find no support for CTP's argument that it developed its interference sensing approach prior to that of other interference avoidance proposals. Its proposed ISCDMA is a compilation of CT-2 Plus concepts and Qualcomm's equipment and lacks innovativeness. CTP maintains that it is the only applicant that has entirely original PCS technology; however, it also states that its interference sensing concept is well established due to its use in CT-2 and CT-2 Plus operations,[231] and that it has conveyed its ownership in its CT-2 invention to another company. Accordingly, for the reasons stated herein, we deny CTP's pioneer's preference request.

210. *Nextel Communications, Inc.*[232] *(PP-54).* Nextel requests a pioneer's preference based on its Digital Mobile technology that it currently is implementing for Enhanced Specialized Mobile Radio (ESMR) service. Nextel proposes to use its technology to provide voice and data services using low-power base stations and handsets. It claims that Digital Mobile technology provides six times the capacity of analog technology on a 25 kilohertz frequency, and is capable of increasing SMR capacity by at least 15 times.[233] Nextel contends that its Digital Mobile technology represents advances in system capacity, power control for mobile and handheld units, frequency agility, subscriber assisted handoff, integration of disparate services, and seamless infrastructure.[234] Further, Nextel argues that while the initial development and implementation of this technology is in the ESMR service, its full realization can be achieved in the broader PCS service.[235]

211. GTE asserts that Nextel's request for a preference based on advances it is implementing in an existing service, ESMR, is inappropriate in the instant proceeding because its effort and risk was not undertaken for the purpose of PCS.[236] PacTel also opposes Nextel's request, concurring with GTE that Nextel already has been rewarded for its work by ESMR license approval. Further, PacTel argues that Nextel has not demonstrated a contribution to the development of PCS in the 2 GHz band under consideration in this docket.[237]

212. In reply comments, Nextel argues that the technology discussed in all the PCS pioneer's preference requests was developed for other services, and that its development of Digital Mobile technology for the ESMR service should not exclude it from obtaining a PCS preference.[238]

213. In our *Tentative Decision* we proposed to deny Nextel a preference because the proposal constitutes a compilation or aggregation of existing communications technologies or systems or otherwise does not constitute a unique or innovative technology or service proposal. In response, Nextel contends that the Commission did not consider its proposal separately and in detail and failed to state independent reasons for the tentative denial. It argues that its Digital Mobile technology is innovative and would provide an optimum platform for a wide array of new PCS services.[239] It further argues that the Commission's tentative denial contradicts our *Waiver Order*,[240] in which we found implementation of Nextel's technology within the SMR service to be innovative and unique.[241] Further, Nextel claims that implementation of its technology in the 800 MHz SMR bands validates its feasibility as a platform for 2 GHz PCS.[242]

214. We disagree that Nextel's pioneer's preference request was not independently evaluated in the *Tentative Decision*. While we grouped the reason for Nextel's tentative denial with others, all were independently evaluated. We find that its preference request is a description of the technology and services it has designed and implemented within the SMR service. While Nextel discusses advances it has made to SMR services, it does not explain or otherwise demonstrate how it plans to use Digital Mobile technology for PCS in ways different from ESMR, or how its technology would result in different services. Specifically, while Nextel broadly states that if awarded a preference it will use its technology for microcell applications for in-building and pedestrian services, it does not define specific services, demonstrate by experimentation or technical showing the feasibility of providing these services in the spectrum range proposed for PCS, or explain what advantages its PCS

230 *See* CTP at Exhibit G, page 21 (January 29, 1993).
231 CT-2 Plus refers to the addition of a pager to CT-2 service. CTP asserts that CT-2 Plus design would use an interference avoidance technique in which its mobiles would scan a channel for interference before using that channel.
232 Nextel was formerly known as Fleet Call, Inc.
233 *See* Nextel at 2 (May 4, 1992).
234 *Id.* at 15.
235 *Id.* at 3.
236 *See* GTE at 18 (June 10, 1992).
237 *See* PacTel at 17 (June 10, 1992).
238 *See* Nextel Reply at note 8 (June 10, 1992).
239 *See* Nextel at 9 (January 29, 1993).
240 *See Waiver Order*, 6 FCC Rcd 1533; *recon. denied*, 6 FCC Rcd 6989 (1991).
241 *See* Nextel at 11 (January 29, 1993).
242 *See* Nextel Reply at 7 (March 1, 1993).

proposal at 2 GHz will provide relative to its existing ESMR operations at 800 MHz. Merely transferring essentially the same technology and infrastructure from 800 MHz to 2 GHz does not qualify as innovative within the pioneer's preference context.

215. Our statements regarding Nextel's technology in the *Waiver Order* are inapplicable to the instant proceeding. In the *Waiver Order*, we found the enhancements to SMR to be innovative when compared to existing services. However, Nextel's PCS proposal is little different from the now-existing ESMR service. Further, Nextel's proposed PCS services, including two-way voice and data with handoff capability and automatic power control, are similar to those many other applicants are proposing. Nextel has not addressed how it may provide these services in the 2 GHz band, where propagation, technology, and existing services present a significantly different environment. Accordingly, we deny Nextel's request for a pioneer's preference.

216. *Freeman Engineering Associates, Inc. (Freeman) (PP-55).* Freeman requests a pioneer's preference for developing digital switching equipment that could be interfaced with PCS equipment. Freeman states that use of its digital switch will enhance PCS by allowing "total integration of PCN, cellular, dispatch, wireless PBX, LAN data networks, wide area data networks, paging and voice messaging, along with enhancements to allow access by regular telephone subscribers to deaf subscribers and vice versa." Freeman claims that its proposal will increase spectrum efficiency by increasing control over screening and routing of telephone calls. It also claims that this control will result in reduced air time.[243]

217. PacTel argues that Freeman is proposing existing technology that does not appear to be innovative.[244] Both PacTel and GTE also state that Freeman has not completed any experiments.[245] In addition, GTE maintains that Freeman bases its request on its efforts to develop switching equipment specifically for PCS, but that its application provides little information to judge why compared to existing designs its switching design would be considered innovative.

218. In response to GTE's comments, Freeman states that its switch is only one component of its proposal, and that it has proposed a new, usable, and innovative system.[246] In response to PacTel's comments, Freeman states that it proposes to combine elements of existing technology in a new and innovative way to provide a new and spectrally efficient service and argues that the pioneer's preference criteria recognize use of existing technology in new and innovative ways.[247]

219. In the *Tentative Decision*, we proposed to deny Freeman a preference because the technical showing or preliminary result did not demonstrate the feasibility of the technology, or that Freeman had not demonstrated development of the capabilities or possibilities of a specific identifiable PCS technology or service or had brought it to a more advanced or effective state.

220. Responding to the tentative denial of its request, Freeman argues that under the pioneer's preference rules it is entitled to sufficient time to complete tests pursuant to its experimental license before the Commission determines whether its application for a preference should be granted or denied.[248] Further, Freeman claims that its most recent report shows that it has developed the capabilities or possibilities of PCS and brought it to a more advanced and effective state.

221. We find that the progress report Freeman refers to does not demonstrate that it has completed its tests. Rather, the report indicates that Freeman merely has performed limited testing of switches and has concentrated mainly on the software aspects of those switches.[249] Freeman does not provide any additional detail to clarify what it has accomplished that is innovative for PCS nor demonstrated the feasibility of its proposal. Accordingly, we deny Freeman's request for a pioneer's preference.

222. *Grand Broadcasting Corporation (Grand) (PP-56).* Grand proposes a two-way PCS service but does not provide specific details of its system. In comments on Grand's request, GTE states that Grand's proposal relies on many existing technologies and is not innovative.[250] PacTel states that Grand does not demonstrate the proposal's technical feasibility.[251]

223. In the *Tentative Decision* we proposed to deny Grand a pioneer's preference because Grand did not demonstrate the technical feasibility of its proposed PCS system or the capabilities of a specific identifiable PCS technology. Grand did not respond to the *Tentative Decision*. Accordingly, we deny Grand's pioneer's preference request.

224. *Iowa Network Services, Inc. (Iowa) (PP-57).* Iowa proposes to use fiber optic infrastructure as backbone for PCS and to provide wireless centralized equal access for PCS. GTE contends that Iowa has not addressed the radio portions of PCS and therefore should be denied a preference.[252]

225. In the *Tentative Decision* we proposed to deny Iowa a preference because Iowa failed to submit either the preliminary results from an experiment or a sufficient showing of technical feasibility. Iowa did not respond to the *Tentative Decision*. Accordingly, we deny Iowa's pioneer's preference request.

226. *Omnipoint Corporation, Oracle Data Publishing, Inc., and McCaw Cellular Communications, Inc. (Omnipoint Oracle) (PP-59).* Omnipoint Oracle proposes a Data BroadCast Service (DBCS) or high speed, high volume information "superhighway," that it describes as a one-way data transmission service using spread spectrum techniques. In comments to Omnipoint Oracle's pioneer's preference request,

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[243] *See* Freeman Request for a Pioneer's Preference (May 4, 1992).
[244] *See* Pacific Bell at 21 (June 10, 1992).
[245] *Id. See also* GTE at 18 (June 10, 1992).
[246] *See* Freeman Reply at 3 (June 25, 1992).
[247] *Id.*
[248] *See* Freeman Comments and Supplemental Information (January 29, 1993).
[249] *See* Progress Report at 1-2 (March 19, 1993).
[250] *See* GTE at 19 (June 10, 1992).
[251] *See* PacTel at 13 (June 10, 1992).
[252] *See* GTE at 17 (June 10, 1992).

PacTel argues that this service is not directly relevant to PCS. GTE states that Omnipoint Oracle has not made a sufficient showing of technical feasibility.[253]

227. In the *Tentative Decision*, we proposed to deny Omnipoint Oracle's request because its request did not demonstrate the technical feasibility of its proposal or that the requester has developed the capabilities or possibilities of a specific identifiable PCS technology or service or had brought it to a more advanced or effective state. Omnipoint Oracle did not respond to our tentative denial. Accordingly, we deny Omnipoint Oracle's pioneer's preference request.

228. *Omnipoint Mobile Data Company (Omnipoint Mobile) (PP-60).* Omnipoint Mobile has proposed a service it calls asymmetrical two-way wireless network (ATWN). ATWN is designed to deliver two-way data communications to mobile computing devices such as portable terminals and new pen-based computers. In comments to Omnipoint Mobile's pioneer's preference request, PacTel supports the general concept of a mobile-data service but argues against a preference for Omnipoint Mobile without further information being submitted that describes its system.[254] GTE states that the proposal is extremely theoretical and does not demonstrate the technical feasibility of an innovation in communications technology.[255]

229. In the *Tentative Decision* we proposed to deny Omnipoint Mobile's request because its request did not demonstrate the technical feasibility of its proposal or that the requester has developed the capabilities or possibilities of a specific identifiable PCS technology or service or had brought it to a more advanced or effective state. Omnipoint Mobile did not respond to the *Tentative Decision*. Accordingly, we deny Omnipoint Mobile's pioneer's preference request.

230. *Pacific Bell (PP-61).* Pacific Bell requests a pioneer's preference based on its development of "Universal Digital Personal Communications Service" (UDPCS) and for spectrum sharing techniques developed by its sister company, Telesis Technologies Laboratory (TTL). Pacific Bell claims UDPCS provides low-cost service, easy implementation, and personalized communications. It also claims that its spectrum sharing techniques are innovative because the cell design permits automatic frequency coordination among contiguous cells, avoiding costly and time consuming frequency coordination. Specifically, according to Pacific Bell, TTL developed an approach for it that is based upon spatial sharing, or the sharing of the same radio resource at the same time but in a different area. Further, Pacific Bell maintains that its use of existing telephone company wireline interfaces simplifies the design criteria for handsets and radio ports, and its use of existing infrastructure creates an economical wireless access system.

231. In comments to Pacific Bell's pioneer's preference request, GTE states that Pacific Bell has not shown an innovation in communications technology but merely advocates connecting well-understood radio technologies to pre-existing wireline technology involving transport and network intelligence.[256] However, PacTel maintains that both it and Pacific Bell have made substantial contributions to PCS development.[257]

232. In the *Tentative Decision*, we proposed to deny Pacific Bell a preference because the proposal constitutes compilations or aggregations of existing communications technologies or systems or otherwise does not constitute a unique or innovative technology or service proposal.

233. Responding to the *Tentative Decision*, Pacific Bell contends that its proposed system is not a compilation of existing technologies and that it has been active in its development through joint ownership of Bellcore. Pacific Bell states that it and other Bell Operating Companies (BOCs) funded and directed Bellcore to explore low power digital wireless radio in 1984 and that it and another BOC funded and directed Bellcore to develop a PCS Framework Technical Advisory Group. Pacific Bell maintains that while this was shared research, the sharing aspect does not minimize its claim of innovation. Pacific Bell contends that it is the only owner of Bellcore to combine its research with that of its sister company, TTL.

234. Pacific Bell commissioned Comsearch to compare its preference request with others and Comsearch concluded: "By comparison to other Pioneer Preference Requests, the Pacific Bell proposal reads like a text-book profile of a pioneering innovative applicant . . . Pacific Bell has developed a spectrum sharing strategy that is significantly more innovative than FAST."[258] According to Comsearch, FAST assumes ideal and not real world conditions and thus is prone to a high level of interference between PCS and existing microwave users, whereas TTL has developed an approach for Pacific Bell that is based upon spatial sharing. Also in contrast to FAST, according to Comsearch, TTL's spectrum sharing technique takes into consideration one-way links and links that vary from an 80 megahertz spread, resulting in less interference.

235. We find that Pacific Bell has not demonstrated a new or innovative technology. On the contrary, its proposal consists of equipment and technology that existed before and is merely reconfigured. When the Commission developed its pioneer's preference rules, it emphasized that to warrant a pioneer's preference an applicant must present an innovation that involves a substantial change from that which existed prior to the time the preference is requested and demonstrate its responsibility for the innovation.[259] Pacific Bell's "spatial sharing" approach appears to be indistinguishable from the traditional frequency management approach of geographically separating stations. Accordingly, we deny Pacific Bell's pioneer's preference request.

236. *PacTel Corporation (PP-62).* PacTel bases its pioneer's preference request on work it and its subsidiary, Telesis Technologies Laboratory, have performed with respect to PCS spread spectrum technology. In comments on PacTel's request, GTE argues that other parties have made similar contributions, and that there is nothing innovative about PacTel's request.[260]

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253 *See* PacTel at 14 and GTE at 12 (June 10, 1992).
254 *See* PacTel at 29 (June 10, 1992).
255 *See* GTE at 19 (June 10, 1992).
256 *Id.* at 9.
257 *See* PacTel Reply at 22 (June 25, 1992).
258 *See* PacTel Reply at 7 (January 29, 1993).
259 *See Pioneer's Preference Report and Order, supra* note 2, 6 FCC Rcd at 3494.
260 *See* GTE at 9 (June 10, 1992).

237. In the *Tentative Decision*, we proposed to deny PacTel's pioneer's preference request, finding that its proposal was a compilation or aggregation of existing communications technologies or systems, or otherwise did not constitute a unique or innovative technology or service proposal. PacTel did not respond to the *Tentative Decision*. Accordingly, we deny PacTel's pioneer's preference request.

238. *PageMart, Inc. (PP-63)*. PageMart requests a pioneer's preference in ten major markets based on its proposed Personal Radio Telephone Service (PRTS). The proposed service would employ a 3-tier hierarchy of citywide, building, and picocell coverage and allow two-way voice and data, but without handoff capability. PageMart's handset would operate as a conventional cordless telephone (CT-1 type) at home and a CT-2 type telephone outside the home and would have "public" and "private" modes of operation that could determine the least expensive communications route. "Public mode" would allow access to public cells and could use PRTS airtime whereas "private mode" could initiate and receive calls only from private cells that are connected to the existing wireline network. Calls from public cells, while in private mode, would be received as a page. The PRTS would first attempt to route calls over private cells to avoid airtime costs, with unsuccessful calls routed over public cells. PageMart estimates that the monthly cost of PRTS would be a $10-15 access fee and 10-15 cents/minute for airtime.[261]

239. In comments to PageMart's pioneer's preference request, PacTel states that PageMart has not demonstrated innovation.[262] GTE maintains that PageMart has not demonstrated the technical feasibility of its technology, including the necessary coordination of public and private microcells. Further, GTE claims that PageMart's proposal requires an excessive amount of spectrum and that its cost assumptions are suspect.[263] Viacom argues that PageMart does not justify its request for ten markets to amortize investment in PCS and states that its own economic analysis indicates that the investment can be amortized over a single geographic area.[264]

240. In reply comments , PageMart argues that it merits a preference because its PRTS system will be more ubiquitous, comprehensive, and cost effective than any competing PCS proposal. In response to PacTel, PageMart states that its request is based upon its contribution of an innovative hierarchical network design and simulcast signaling that is independent of any single modulation approach.[265] In response to GTE's arguments, PageMart states that: (1) coordination of public and private microcells can be done by broadcasting channelization information in each cell so that the subscriber unit will always know which channel to seize for call initialization or completion; (2) low cost service can be provided due to increased system capacity with demand; and (3) GTE equates spectrum efficiency with size of bandwidth rather than quantity of transmitted information. Finally, in response to Viacom, PageMart asserts that limiting a preference to one geographic area provides insufficient incentive for a pioneer to bring its ideas to the Commission, and would restrict the use of advanced technology by forcing communications to be provided in the least expensive manner to recover cost of investment.[266]

241. In the *Tentative Decision*, we proposed to deny PageMart's request for a preference because PageMart had not demonstrated the feasibility of the technology or that it had developed the capabilities or possibilities of a specific identifiable PCS technology or service or had brought it to a more advanced or effective state.

242. In its comments to the *Tentative Decision*, PageMart reiterates that it deserves a preference because it has pioneered an innovative technique of network design and performance that requires little infrastructure investment. In addition, PageMart states that PRTS is worthy of a preference because it uses one universal, lightweight, inexpensive handset and accommodates cordless home telephones, wireless in-building communications, and portable telecommunications; all to a single, personal telephone number.[267]

243. After reviewing the record, we conclude that PageMart has not demonstrated the technical feasibility of its PRTS system and that the PCS rules we have adopted are inconsistent with PageMart's proposal. PageMart stated in its May 4, 1992 Request for Pioneer's Preference that its experimental efforts will enable it to confirm the feasibility of the key elements of PRTS. However, PageMart does not have an experimental authorization at 2 GHz.[268] We cannot conclude from the record that its PRTS technology is feasible. Further, PageMart has not substantiated its claims with technical details concerning its ability to accomplish and implement its proposal; *i.e.*, handset and cellular technologies, modulation type, and frequency coordination. In addition, PageMart has not explained the basis for the cost of service figures on which it relies in its request. Finally, PageMart's request for 60 megahertz is inconsistent with the rules adopted in the PCS *Second Report and Order*. Accordingly, for the above reasons, PageMart's request for pioneer's preference is denied.

244. *Panhandle Telephone Cooperative, Inc. (Panhandle) (PP-64)*. Panhandle requests award of a pioneer's preference for proposing to provide PCS to rural locations in Oklahoma. However, it does not provide specific technical details of its proposed system. In comments to Panhandle's pioneer's preference request, GTE contends that since Panhandle has not tested its proposal, it should not be awarded a preference.[269]

245. In the *Tentative Decision*, the Commission proposed to deny Panhandle's request for pioneer's preference, concluding that Panhandle had failed to submit either the preliminary results from an experiment or a sufficient

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261 *See* PageMart Request at 3 (May 4, 1992).
262 *See* PacTel at 22 (June 10, 1992).
263 *See* GTE at 13 (June 10, 1992).
264 *See* Viacom at 20 (June 10, 1992).
265 *See* PageMart Reply at 5 (June 25, 1992).
266 *Id.* at 7.
267 *See* PageMart at 3 (January 29, 1993).
268 PageMart has four experimental licenses at 930-931 MHz. PageMart states that through its experiment at 930-931 MHz it will verify and refine key system elements and analyze areas of potential trade-offs in a related technology called Personal Information Messaging System (PIMS).
269 *See* GTE at 17 (June 10, 1992).

showing of technical feasibility. Panhandle did not respond to the *Tentative Decision*. Accordingly, we deny Panhandle's pioneer's preference request.

246. *PCN Communications, Inc. (PCNC) (PP-65).* PCNC proposes a PCS system using 50 megahertz of bandwidth utilizing shared PBX technology interfaced with a proposed PCS network. In comments to PCNC's pioneer's preference request, PacTel argues that SCSM and Ericsson Corporation are more worthy of a preference than PCNC for this proposed innovation and recommends denying the request.[270] GTE contends that PCNC's alleged innovation is merely a compilation of other's efforts.[271]

247. In the *Tentative Decision*, the Commission tentatively rejected PCNC's pioneer's preference request because PCNC's wideband approach was inconsistent with the rules proposed in the *Notice*. PCNC did not respond to the *Tentative Decision*. Accordingly, we deny PCNC's pioneer's preference request.

248. *PerTel, Inc. (PerTel) (PP-66).* PerTel requests a pioneer's preference for its proposal to investigate using CDMA techniques for PCS. In comments on PerTel's pioneer's preference request, PacTel and GTE object to the grant of a preference to PerTel because it has not demonstrated an innovative proposal.[272]

249. In the *Tentative Decision* we proposed to deny PerTel's request on the basis that its proposed system was a compilation or aggregation of existing communications technologies or systems, or otherwise did not constitute a unique or innovative technology or service proposal. PerTel did not respond to the *Tentative Decision*. Accordingly, we deny PerTel's pioneer's preference request.

250. *Pulson Communications Corporation (Pulson) (PP-67).* Pulson plans to provide PCS using "impulse radio" -- a technology it says that it purchased from Time Domain Systems, Inc. However, Pulson offers only a sketchy description of what impulse radio is. In comments to Pulson's pioneer's preference request, both PacTel and GTE object to awarding a preference to Pulson because it has not demonstrated the feasibility of its proposed system.[273]

251. In the *Tentative Decision*, we proposed to deny Pulson's request for a preference because it had not demonstrated the feasibility of the technology, or that Pulson was responsible for developing the capabilities or possibilities of a specific identifiable PCS technology or service or for bringing it to a more advanced or effective state. Pulson did not respond to the *Tentative Decision*. Accordingly, we deny Pulson's pioneer's preference request.

252. *Qualcomm Incorporated (PP-68).* Qualcomm requests a pioneer's preference for its development of a digital voice and data system that uses CDMA technology in 1.25 megahertz channels. It contends that its narrowband CDMA system can use spectrum not used by existing fixed microwave operations, and therefore that use of its technology would alleviate the necessity to relocate existing users of the 2 GHz band. Qualcomm argues that FDMA, TDMA, and wideband CDMA will not be able to provide the flexibility required to operate under the technical constraints present in this band.

253. Qualcomm states that its system includes use of a database of existing microwave paths that aids in assigning channels that will not interfere with fixed microwave systems.[274] It asserts that CDMA permits frequency reuse of N=1. Qualcomm also proposes a distributed antenna system to deploy picocells in strings connected to the CDMA base stations to provide ubiquitous coverage. The result of these innovations, Qualcomm claims, is that its digital voice and data service is capable of providing ten times the capacity of analog cellular services in the same bandwidth. Qualcomm also asserts that its system is designed to operate in all environments, ranging from densely populated pedestrian to fast-moving vehicular.

254. Qualcomm developed its system for 800 MHz digital cellular applications, but says that it has modified its 800 MHz system to operate in the 1800 MHz range. Qualcomm states that it has tested 1800 MHz CDMA equipment in a wireless local loop application.[275] Qualcomm adds that in the future it will perform interference tests at 1800 MHz to "provide the basis for implementing software changes to the basic CDMA system so that coexistence' criteria can be used in PCS operations."[276]

255. In comments filed on Qualcomm's request, GTE asserts that Qualcomm does not satisfy the Commission's requirements for a technical demonstration.[277] Viacom states that the only way Qualcomm's proposed system can share 2 GHz spectrum with existing users and adhere to interference criteria is by not allowing co-channel CDMA transmissions.[278] Viacom contends that coexistence will require a frequency sharing and coordination scheme to prevent CDMA signals from interfering with microwave operations, and asserts that Qualcomm did not adequately address this topic in its filing. Therefore, Viacom asserts that Qualcomm does not merit a preference because it failed to adequately address spectrum sharing and failed to demonstrate the technical feasibility of its proposal.

256. AMT/DSST also oppose granting a preference to Qualcomm, arguing that Qualcomm designed its system for the 800 MHz cellular service.[279] They claim that Qualcomm has announced publicly that its system was developed to be the standard for digital cellular systems and that the CDMA architecture it proposes for PCS differs only in frequency from its proposal for digital cellular. Finally, AMT/DSST assert that the technological choices Qualcomm made to meet the needs of cellular systems operating in the 800 MHz range are not optimal for PCS applications. For example, they maintain that Qualcomm's system was designed for large cells and subscriber units that

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[270] *See* PacTel at 14 (January 24, 1992).
[271] *See* GTE at 19 (January 24, 1992).
[272] *Id. See also* PacTel at 22 (January 24, 1992).
[273] *See* GTE at 13 and PacTel at 29 (January 29, 1992).
[274] Qualcomm proposes to apply the interference criteria of Bulletin 10E and perform extensive interference tests to determine exclusion zones around microwave receivers. It states that its automatic power control will permit its mobiles to operate at the minimum power necessary, thereby reducing interference. It also proposes to use soft handoff, which permits a mobile to stay on one frequency, but switch the cell if interference occurs in the original cell. It further proposes to use hard handoff, which permits a mobile to change frequencies if interference occurs on the original frequency. Qualcomm claims that implementation of these techniques in conjunction with the spreading characteristics of CDMA will permit its PCS network to coexist with microwave systems.
[275] *See* Qualcomm at 6 (June 10, 1992).
[276] *See* Qualcomm Request at 9 (May 4, 1992).
[277] *See* GTE at 9 (June 10, 1992).
[278] *See* Viacom at 17 (June 10, 1992).
[279] *See* AMT/DSST Reply at 7 (June 25, 1992).

are often mounted or carried in vehicles that move at high speed. AMT/DSST argue that the large cells cause greater multipath problems than small cells and that the mobile speeds require technical complexity to realize cell-to-cell handoff at high speed.

257. Several parties, including PacTel and Bell Atlantic, support Qualcomm's preference request, based on what they maintain is its innovative work in narrowband CDMA.[280] PacTel states that Qualcomm was the first to do this work and show that narrowband CDMA is feasible. Bell Atlantic states that no one disputes Qualcomm's claim of having pioneered the use of CDMA for mobile cellular applications.[281]

258. Qualcomm's reply comments state that Viacom does not fully understand Qualcomm's system. Qualcomm states that it has demonstrated the feasibility of its system and that the system avoids interference by taking advantage of power control, hand-off, frequency agility, digital control channel capabilities, and other features.

259. In the *Tentative Decision*, we proposed to deny Qualcomm's request for a pioneer's preference. We concluded that Qualcomm's PCS system appeared essentially to be identical to that which it had developed for the 800 MHz cellular bands. We found no evidence that Qualcomm had developed and tested its system at 2 GHz, nor that it was designed or could work in a spectrum sharing arrangement at 2 GHz. We therefore tentatively concluded that Qualcomm did not merit a preference for merely proposing that its existing 800 MHz CDMA system be converted to work at 2 GHz.

260. Responding to the *Tentative Decision*, Qualcomm states that the Commission misunderstood the innovative nature of its proposal.[282] Qualcomm claims that it does not seek a preference for the radio frequency engineering techniques used to operate its CDMA system in the 2 GHz band. Rather, Qualcomm claims it merits a preference for conceiving, designing, constructing, and testing an end-to-end communications system with unique, patented features including advanced coding and signal processing subsystems, a power control system to reduce mobile power requirements, and a receiver that facilitates soft hand-off and mitigates the harmful effects of multipath.[283] Qualcomm argues that its coding and processing technology permits it to offer frequency sharing and multiple services from a single platform to ensure successful development of PCS, and that it has tested and validated a working 2 GHz PCS system.

261. Qualcomm states that while it did not invent the idea of CDMA, it added significantly to the technology by developing new hardware and software to solve many of the propagation and spectrum sharing problems that have plagued CDMA's use in mobile communications. Qualcomm asserts that it solved the "near-far" problem by using its patented power control system that includes both open and closed loop subsystems and that its signal design and receiver technology mitigate the negative effects of multipath.[284]

262. Qualcomm argues that the Commission's tentative denial of its request, based upon its technology being identical to its cellular CDMA technology, is not germane. It asserts that it should not be penalized for developing a versatile CDMA system that can be used at different frequency bands. Qualcomm argues that because its system was adapted first for cellular use at 800 MHz does not negate the innovative nature of using its system at 2 GHz for PCS. It contends that the Commission did not penalize the other applicants awarded a tentative pioneer's preference for building on and improving existing technologies. Qualcomm also claims that in addition to its work in the traditional cellular configuration, it has implemented microcells, low power picocells, large microcells, and a distributed antenna system to provide ubiquitous coverage. It maintains that its system will provide service to persons in a mobile, pedestrian, and in-building environment providing any combination of voice and data.

263. Qualcomm also states that it has developed distributed antenna and microcell systems for its PCS system.[285] It asserts that its distributed antenna is designed to increase multipath and signal diversity and that it will permit extensive in-building coverage without cell-to-cell handoff, thus providing a low cost and high quality service. Qualcomm also asserts that it has developed a microcell extension of the CDMA base station that permits concentrated CDMA coverage in high density or shadowed areas. Qualcomm argues that it has developed hardware and software for base stations, switching, and subscriber equipment that operates in the 1850-1990 MHz band, and states that it has developed its exclusion zone proposal around microwave operations in this band.

264. GTE and CTP offer some support for Qualcomm's comments. GTE argues that the tentative grant to APC without one to Qualcomm is not consistent or logical, given that APC used Qualcomm's equipment in its experimental work.[286] CTP states that it will test Qualcomm's equipment because it is the "simplest, most elegant adaptation that would preserve the innate cost and capacity advantages of CDMA while providing maximum capability for frequency sharing with fixed microwave."[287]

265. In the *Tentative Decision*, we agreed with AMT/DSST that Qualcomm did not qualify for a preference because many of its innovations were designed for implementation at cellular frequencies. We proposed to deny Qualcomm's request because its narrowband CDMA system essentially is identical to that which it already has developed for use in the 800 MHz cellular bands. This includes the advanced coding, signal processing subsystems, power control system, and receiver, not merely the radio frequency engineering techniques.

266. We continue to believe that most of the technical developments and patents associated with Qualcomm's proposal were developed for implementation of its 800 MHz digital cellular system, and we disagree that adapting this work to the 2 GHz PCS band is innovative. Additionally, the services that Qualcomm proposes are already permitted

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[280] *See* PacTel at 10, PerTel at 5, and Pulson at 4 (June 10, 1992).

[281] *See* Bell Atlantic at 16 (January 29, 1993).

[282] *See* Qualcomm at 2-4 (January 29, 1993).

[283] *Id.* at 3-4.

[284] In a CDMA system, a mobile that is far away from the base station must have the same signal level at the base station as a mobile that is close. In order for a CDMA system to stack multiple users on the same channel with different codes, the users' power levels need to be equalized or the system's capacity is limited.

[285] *See* Qualcomm Report at 3 (November 4, 1992).

[286] *See* GTE at 3 (January 29, 1993).

[287] *See* CTP at 17 (January 29, 1993).

in the cellular bands. While Qualcomm has done work at 2 GHz on exclusion zones around microwave towers, the use of smaller cells, and remote antennas, after extensive review we have been unable to identify a specific significant aspect of this work that is innovative and for which Qualcomm is responsible. Therefore, while Qualcomm's equipment appears viable for the provision of PCS services, it does not qualify Qualcomm for a preference. Accordingly, we deny Qualcomm's pioneer's preference request.

267. *Satcom, Inc. (Satcom) (PP-70).* Satcom requests a pioneer's preference for developments related to using cable infrastructure in conjunction with cell "stretching" technology[288] to make feasible provision of PCS in less populated and low density areas.[289] Satcom maintains that its innovations are important to the introduction of affordable PCS to rural America. It states that its proposal will: 1) utilize existing cable plant, and thereby minimize the net capital costs of PCS microcell technology; 2) utilize roamer corridors in low-density rural areas to minimize capital investment in base stations and software necessary for call hand-offs; and 3) promote novel business arrangements with long distance carriers to achieve cost-savings.

268. Specifically, Satcom proposes to link microcells using what essentially are repeaters connected to the cable plant, as opposed to installing separate base stations for each microcell. Satcom states that when two or more repeaters (RADs), operate in close proximity and are connected to the same cable plant a distributed antenna pattern (DAP) is formed. According to Satcom, RADs can be linked together along cable plants forming DAPs. Linking DAPs in turn creates what Satcom calls roamer corridors, which link antenna patterns.

269. Satcom states that the primary benefit of roamer corridors is that a user can move within the coverage zone of the RADS/DAPs without call handoff. It maintains that call handoff involves complexity and cost that will be needed only when two roamer corridors adjoin.

270. In comments on Satcom's pioneer's preference request, GTE states that Satcom appears to have established "a colorable claim" to a pioneer's preference, but that the equipment Satcom proposes for its handset is not available and that its request is not supported by a showing of technical feasibility.[290] PacTel asserts that Satcom's proposed cable infrastructure lacks necessary switching capability and standard interfaces.[291] Further, PacTel contends that merely modifying cable infrastructure should not qualify for a preference.

271. In reply comments, Satcom states that it is now using equipment that is readily available and has demonstrated its technical feasibility. Further, it maintains that its claim to innovation is not the handset technology, but its proposed CATV-PCS architecture. Satcom also maintains that PacTel's comments do not consider that using the cable infrastructure was but one facet of the Satcom technical proposal and that PacTel takes no account of Satcom's proposed cell stretching that will facilitate provision of affordable PCS in low density population areas.

272. In the *Tentative Decision* we proposed to deny Satcom's pioneer's preference request because, while the proposal may have demonstrated an efficient plan to use cable facilities to provide PCS, Cox appeared to have first proposed such integration, developed the necessary hardware, and conducted at least preliminary field trials with actual hardware. In responding to the *Tentative Decision*, Satcom argues that it is the only cable-based PCS proponent to examine and test PCS in rural settings, and that its proposal complements other cable-based PCS proposals by facilitating provision of low-cost PCS in low density areas that differ, both economically and technically, from the test sites of other applicants in major metropolitan areas. Satcom claims that it meets each of the tests specified in the pioneer's preference rules and that its contribution is virtually indistinguishable from that of Cox; *i.e*, it has proposed, developed, and tested an efficient PCS network by utilizing existing cable infrastructure.

273. We find that, despite Satcom's characterization of its proposal as innovative, other parties have made similar proposals. In particular, Satcom's proposal uses the cable infrastructure as an integral part of the PCS system to maximize efficiency and reduce cost, and uses the RAD concept. Further, while Satcom has described its stretching technology using cable infrastructure, it has not fully described the PCS system that it plans to connect with the cable plant. For example, no details regarding bandwidth, transmitting power, and type of services to be provided are given. Additionally, Satcom's proposed cell-stretching is inherent in the use of the cable infrastructure for PCS in all areas, and roamer corridors are inherent in the use of the cable infrastructure for PCS in rural areas. Therefore, we cannot conclude that Satcom has developed a PCS technology that is innovative. Finally, novel business arrangements are not relevant to award of a PCS pioneer's preference. Accordingly, for these reasons, we deny Satcom's pioneer's preference request.

274. *SM Tek, Inc. (SM Tek) (PP-72).* SM Tek requests a pioneer's preference based on its efforts to use frequencies higher than 2 GHz to provide PCS. PacTel and GTE oppose SM Tek's pioneer's preference request, stating that SM Tek has failed to demonstrate the technical feasibility of a new and innovative technology.

275. In the *Tentative Decision* we proposed to deny SM Tek's request for a pioneer's preference on the basis that its proposed system was a compilation or aggregation of existing communications technologies or systems, or otherwise did not constitute a unique or innovative technology or service proposal. SM Tek did not respond to the *Tentative Decision*. Accordingly, we deny its pioneer's preference request.

276. *Spatial Communications Inc. (SCI) (PP-73).* SCI proposes to provide PCS using a technology it labels "Spatial-Division Multiple Access" (SDMA). SCI claims SDMA will increase spectrum efficiency by a factor of ten by identifying the location of PCS subscribers, permitting directional transmissions. In comments to SCI's pioneer's preference request, PacTel states that SCI's proposal is technically

[288] Cell stretching is the term used by Satcom to describe the use of existing CATV systems to increase the service area of PCS cells.

[289] *See* Satcom's Pioneer's Preference Request at 2 (May 4, 1992).

[290] *See* GTE at 10 and 13 (June 10, 1992).

[291] *See* PacTel at 26 (June 10, 1992).

elegant and intriguing and shows great promise. However, both PacTel and GTE maintain that SCI has not demonstrated the technical feasibility of its system.

277. In the *Tentative Decision*, we proposed to deny SCI's request for a preference because it had not demonstrated the feasibility of the technology, or that SCI was responsible for having developed the capabilities or possibilities of a specific identifiable PCS technology or service or for bringing it to a more advanced or effective state. SCI did not respond to the *Tentative Decision*. Accordingly, we deny SCI's pioneer's preference request.

278. *Suite 12 Group (Suite 12) (PP-74)*. Suite 12 requests a pioneer's preference for its proposal to use patented technology that it developed for 28 GHz Local Multipoint Distribution Service (LMDS) to implement PCS at 2 GHz. Suite 12 states that its technology can be used for intra- and inter-building wireless communications and to provide a backbone system for PCS.[292] According to Suite 12, its technology enables two-way communications and frequency reuse in both adjacent cells and within a cell. Suite 12 states that it should be granted a pioneer's preference because it has developed a new technology that can provide PCS.

279. Wireless Cable Association International, Inc. (WCA), PacTel, and GTE oppose to Suite 12's pioneer's preference request.[293] WCA questions the ability of Suite 12's technology to accommodate PCS, and also notes that an affiliate of Suite 12, Hye Crest Management, Inc., already has received the equivalent of a pioneer's preference through grant of a waiver to operate in the 28 GHz band. PacTel states that Suite 12's approach raises significant technical questions, including the lack of coverage, delay spread, and scattering, particularly in urban areas. GTE argues that the patented 28 GHz technology proposed for PCS backbone infrastructure by itself does not qualify for a preference to offer PCS service at 2 GHz. Finally, both PacTel and WCA note that Suite 12's innovative claims are already under consideration in the LMDS proceeding[294] and WCA argues that no entity should receive more than one pioneer's preference.[295]

280. In reply comments, Suite 12 states its PCS system can operate at 28 GHz or it can operate as a backbone for PCS operations on other frequencies. With regard to GTE's comments, Suite 12 argues that its proposal is a comprehensive service that can be used in the following ways: 1) as a transport for PCS; 2) as individual multiple minicells within a major cell; 3) as a local area network for buildings that cannot be penetrated by typical line of sight frequencies with long wavelengths; 4) as a "last mile distribution" system for cable or fiber networks; 5) as a transport system; or 6) as a fixed or mobile (with interfaced frequencies) system with fiber optic bandwidth capacity. In addition, Suite 12 claims that its system is capable of interfacing with the PSTN; with systems at 900 MHz and 2 GHz; and with cordless telephones. It also claims that its system is capable of interfacing with systems employing data rates greater than one gigabit and that demonstrations of its system at the David Sarnoff Laboratories have illustrated the feasibility of carrying up to 400,000 simultaneous telephone conversations in a cell.

281. With regard to the technical questions raised by WCA and PacTel, Suite 12 states that it has demonstrated all aspects of its system, most of which have been verified by experiments at the David Sarnoff Laboratories.[296] Suite 12 also states that its request for a pioneer's preference for PCS involves different technological advancements than those relied upon in its pending request for a pioneer's preference for LMDS. Specifically, the technology described in the LMDS pioneer's preference request is for a fixed, two-way video, voice, and data service; whereas the PCS request results from further research, development, and enhancement of Suite 12's technology. According to Suite 12, these enhancements permit an intra-office/inter-office PCS service, a mobile service with an interfaced frequency such as 2 GHz, and a service in which each subscriber has an individual number which can be used in any cell.[297] Finally, Suite 12 asserts that to prohibit an entity from receiving more than one pioneer's preference defeats the entire purpose of the rules. Suite 12 states that technological innovation and development cannot be limited just because an applicant develops multiple technological and service enhancements.

282. In the *Tentative Decision*, we proposed to deny Suite 12 a preference because the frequency band requested is not related to the spectrum under consideration. In reply comments, Suite 12 maintains that we mistakenly assumed that its pioneer's preference request was for 28 GHz. Suite 12 states that although its system could operate in other spectrum, it seeks a preference at 2 GHz. It also states that it has researched, developed, and enhanced its LMDS technology to accommodate mobile PCS operations at 900 MHz and 2 GHz. Suite 12 argues that it was only after the preference requests were filed that the Commission announced its intention to utilize 900 MHz and 2 GHz frequencies and contends that to dismiss an application for a preference because the application is for the wrong frequency band when the Commission had not yet specified the band is inappropriate.

283. Suite 12 further argues that its proposal is functionally identical to Cox's and that it provides a solution to the most troublesome drawback of PCS -- the reliable transport of a large volume of information from cell-to-cell (backbone). It compares its solution of using patented wireless communications technology in the 28 GHz band with Cox's solution of using existing cable facilities, arguing that unlike Cox, Suite 12 actually conceptualized and developed the technology that underlies its proposal.

284. We find that there are significant differences between the requests of Suite 12 and Cox. Cox was awarded a preference for not only proposing a CATV system interface

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[292] *See* Suite 12 Request for Pioneer's Preference (May 4, 1992).

[293] *See* June 10, 1992 filings; GTE Opposition, PacTel Comments, and WCA Opposition.

[294] *See Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration*, CC Docket No. 92-297, 8 FCC Rcd 557 (1993) (pioneer's preference tentatively awarded to Suite 12).

[295] *Id.*

[296] Suite 12 states that it conducted tests in 1991 to ascertain the feasibility of interfacing 900 MHz mobile and 2 GHz PCS band modulators/demodulators with 28 GHz equipment. It says that these tests were witnessed by numerous individuals, including staff of federal regulatory agencies. *See* Suite 12 Reply at 5 (March 1, 1993).

[297] *See* Suite 12 Reply at 7 (June 25, 1992).

with PCS, but also for acquiring the interface equipment, proposing a combined PCS system and CATV facility, and demonstrating the combined system under its experimental test authority. Further, the Cox proposal is an innovation that conserves spectrum because it uses CATV facilities instead of radio without diminishing use of these facilities for CATV. By contrast, the Suite 12 system uses dedicated 28 GHz spectrum for its backbone system. Further, Suite 12 has not demonstrated that its system is technically feasible. Finally, Suite 12 provides no evidence that it has performed tests using 2 GHz equipment. Accordingly, for these reasons, we deny its pioneer's preference request.[298]

285. *Tele-Communications, Inc. (PP-75).* TCI requests a pioneer's preference based on its proposal to integrate PCS and CATV systems. In comments filed to TCI's pioneer's preference request, PacTel and GTE objected to the grant of a pioneer's preference on the grounds that TCI has not demonstrated an innovative technology.[299]

286. In the *Tentative Decision* we proposed to deny TCI a pioneer's preference because, while the proposal may have demonstrated an efficient plan to use cable facilities to provide PCS, Cox appeared to have first proposed such integration, developed the necessary hardware, and conducted at least preliminary field trials with actual hardware. TCI did not respond to the *Tentative Decision*. Accordingly, we deny TCI's pioneer's preference request.

287. *Telmarc Telecommunications (Telmarc) (PP-76).* Telmarc requests a pioneer's preference based on various planned tests including adaptive network management, gateway RF digital front ends, CDMA networks, co-located distributed switch access, and adaptive beam-forming array antennas. However, Telmarc does not describe an identifiable PCS system in its request for a preference. In comments to Telmarc's pioneer's preference request, GTE states that Telmarc's proposal is not innovative and is based on the work of other proponents.

288. In the *Tentative Decision* we proposed to deny Telmarc's request, finding that Telmarc failed to submit either the preliminary results from an experiment or a sufficient showing of technical feasibility. Telmarc did not respond to the *Tentative Decision*. Accordingly, we deny Telmarc's pioneer's preference request.

289. *TRX Transportation Telephone Co. (TRX) (PP-77).* TRX proposes to develop a "Nationwide Transportation Radiotelephone Service" (NTRS) that would provide for the communications needs of the U.S. trucking industry and be located only at truck stops and rest areas. TRX proposes to provide two-way voice, two-way mobile data, vehicle location reporting, advanced messaging services, voice mail, mobile facsimile, information services and financial transactions. The TRX network would consist of base stations located at truck stops and rest areas; in-truck equipment; a network central processor; and a satellite delivery system.[300]

290. TRX proposes to use as a signaling protocol for its system the U.S. standard that emerges for PCS. Base stations in truck stops and rest areas would provide communications capabilities around each area. The driver would access the network when within the coverage zone to communicate from anywhere within the zone using a wireless handset. The central processor would handle and route information throughout the network and would be interconnected to each base station by satellite links or data packet networks. Satellite links would be provided by Very Small Aperture Terminals (VSATs) located at the base stations.

291. In comments to TRX's pioneer's preference request, GTE argues that the proposal is not innovative because virtually all aspects of it can be realized using existing services and Part 15 devices.[301] TRX replies that GTE offers no support for its conclusion that the service could be accomplished using existing radio devices. TRX states that no current system can provide the array of services proposed for its system and that the cost of obtaining the same services from multiple providers would exceed the rates TRX contemplates charging for its service.[302]

292. In the *Tentative Decision* we proposed to deny TRX a preference, concluding that the proposal constitutes a compilation or aggregation of existing communications technologies or systems or otherwise does not constitute a unique or innovative technology or service proposal. In response to the *Tentative Decision*, TRX states that its proposal combines existing technologies and communications systems; however, it maintains that it would establish an innovative and economical service offering a comprehensive, high quality, nationwide network connecting truck stops and rest areas that is not available from any single provider and that meets an important public need by enabling improved timing, efficiency, and quality of information transfer for the American trucking industry. TRX appears to agree that its proposal does not address new technology, but argues that the Commission cannot deny an otherwise meritorious pioneer's preference request on that basis.[303]

293. We conclude that TRX's proposed integration of existing services does not constitute a substantial enhancement to an existing service or an added functionality provided to a broader group of customers, nor does it utilize a new or innovative technology. In addition, the rules to govern PCS adopted in the PCS *Second Report and Order* do not provide for service areas based upon truck stops or other small, separated areas.[304] Accordingly, we deny TRX's pioneer's preference request.

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[298] With respect to Suite 12's argument that it was only after PCS preference requests were filed that the Commission announced its intention to utilize 900 MHz and 2 GHz frequencies for PCS, the PCS *Notice of Inquiry*, adopted on June 14, 1990, specifically discussed use of both of these frequency ranges. It further noted that "mobile communications are only feasible on frequencies below 3000 MHz with current technology," and sought "comment on the feasibility of relocating the microwave licensees in the bands 1850-1990 MHz, 1990-2110 MHz, and 2110-2200 MHz." *See Notice of Inquiry*, GEN Docket No. 90-314, *supra* note 40, at 3997-98.

[299] *See* PacTel at 27 and GTE at 16 (January 24, 1992).

[300] *See* TRX Pioneer Preference Request at 37-42 (May 4, 1992).

[301] *See* GTE at 21 (June 10, 1992).

[302] *See* TRX Reply at 34 (June 25, 1992).

[303] *See* TRX pp. 15-19 (December 24, 1992).

[304] TRX may find, however, that it can provide its proposed service using existing technology and Part 15 or cellular services, or in concert with PCS providers licensed to use the 2 GHz band.

294. *Viacom International, Inc. (Viacom) (PP-78).* Viacom's request for a pioneer's preference is based upon a spectrum sharing technique it proposes called "Spectral Zone Coordination" (SZC) and for its proposed "Power Density Principle" (PDP).[305] Its spectrum sharing technique consists of defining a "spectral zone", or specific range of frequencies, around each microwave receiver within which PCS transmissions would be excluded to avoid interference to the microwave receivers. Viacom states that SZC technology merits a preference because "it is a substantial, innovative advancement of recognized spectrum sharing technology that will enhance the capacity to efficiently and economically institute a PCN service capable of prompt nationwide deployment."[306]

295. Additionally, Viacom claims to have developed a method of quantifying the maximum potential interference of PCS systems to incumbent microwave operators by combining propagation laws, cellular cell-splitting concepts, and adaptive power control. Viacom states that its Power Density Principle explains that an initial PCS system will be designed with large cells using maximum power and antenna heights and as traffic grows new cells will be added using lower power. According to Viacom, the interference potential of the expanded system will never exceed that of the initially deployed system.[307] Viacom claims that the PDP merits a preference award because "it constitutes the first and only recognition that there actually exists a predictable, finite point at which the worst case harmful interference from a PCS system will occur."[308]

296. Using its SZC and PDP, Viacom proposes to implement a system to provide voice, medium speed data, short messaging, personal numbers, smart cards, and administrative features based upon the DCS-1800/Global System for Mobile Communications (GSM) digital cellular system standard developed in the United Kingdom. The GSM standard is the pan-European digital cellular standard and Viacom states that it is now, or shortly will be, widely supported by equipment vendors in the United States.

297. In comments to Viacom's pioneer's preference request, GTE states that the proposal is based upon models and assumptions that have not been tested. GTE therefore asserts that Viacom has not demonstrated the technical feasibility of its proposal.[309] PacTel argues that since Viacom uses a European standard it has not advanced PCS technology and also agrees with GTE that Viacom has failed to show technical feasibility.[310]

298. In reply comments, Viacom responds to PacTel, arguing that its preference request is not based on the European DCS-1800/GSM standard but instead on Viacom's spectrum sharing methodology. In their reply comments, APC, PacTel, and Time Warner raise additional objections to various aspects of Viacom's proposal. APC and Time Warner suggest that Viacom does not merit a preference because its SZC methodology was developed by Impulse Telecommunications Corporation (Impulse). PacTel raises technical objections, contending that Viacom's proposal: 1) does not consider peak power of mobiles or base station;[311] 2) uses spreading bandwidth to calculate an average power density per grid point, independent of frequency;[312] and 3) calculates exclusion zones incorrectly.[313] Time Warner argues that Viacom's study has several weaknesses, such as using extremely optimistic criteria for determining whether sufficient spectrum is available in a region and failing to recognize the need for frequency reuse.[314]

299. Viacom responds that it has a cooperative relationship with Impulse pursuant to which spectrum sharing technical expertise is provided by Impulse and Viacom provides the cable expertise and financial support.[315] Viacom also maintains that the technical assumptions in the SZC models are biased towards worst case conditions and were developed to analyze sharing feasibility, not to engineer cell sites. In conclusion, Viacom states that "none of these criticisms find important faults with the Spectral Zone Coordination approach or its implementation".[316]

300. In the *Tentative Decision* we proposed to deny Viacom a preference because its proposal constitutes a compilation or aggregation of existing communications technologies or systems or otherwise does not constitute a unique or innovative technology or service proposal. Viacom responded to the tentative denial, stating that its SZC and PDP proposals merit a preference because they facilitate spectrum sharing between PCS and microwave systems.

301. We find that Viacom has not demonstrated its responsibility for developing a unique or innovative technology or service. Based upon the information in the record, SZC and PDP appear to be compilations of existing technologies. Accordingly, we deny Viacom's pioneer's preference request.

PROCEDURAL INFORMATION

302. Accordingly, IT IS ORDERED that the requests for pioneer's preference filed by American Personal Communications; Cox Enterprises, Inc.; and Omnipoint Communications, Inc. ARE GRANTED. IT IS FURTHER ORDERED that the relevant licensing bureau shall impose the following conditions on the licenses received by American Personal Communications; Cox Enterprises, Inc.; and Omnipoint Communications, Inc. pursuant to their pioneer's preference awards: 1) Each licensee must build a system that substantially uses the design and technologies upon which its preference award is based; and 2) Each licensee must hold its license for a minimum of three years or until the construction requirements applicable to the five-year build-out period specified in Section 99.206 of the Commission's Rules have been satisfied, whichever is earlier. IT IS FURTHER ORDERED That the requests for pioneer's preference filed by Adelphia Communications Corp.; Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc.; American Por-

305 *See* Viacom Request for Pioneer's Preference (May 4, 1992).
306 *Id.* at 3.
307 *See* Viacom at pp. 6-9 (January 28, 1993).
308 *Id.* at 2.
309 *See* GTE at 13 (June 10, 1992).
310 *Id.*
311 *See* PacTel Reply at 7 (June 25, 1992).
312 *Id.* at 8.
313 *Id.*.
314 *See* Time Warner Reply at 26 (June 25, 1992).
315 *See* Viacom Further Reply at pp. 2-6 (July 8, 1992).
316 *Id.* at 9.

table Telecommunications, Inc.; American Telephone and Telegraph; American TeleZone; Ameritech; Associated PCN Corporation; Atlantic Cellular Company, L.P.; Bell Atlantic Personal Communications, Inc.; Broadband Communications Corporation; Cable USA, Inc.; Cablevision Systems Corporation; Cellular Service, Inc.; Comcast PCS Communications, Inc.; Corporate Technology Partners; Freeman Engineering Associates; Grand Broadcasting Corporation; Iowa Network Services, Inc.; Linkatel Communications, Inc.; LiTel Telecommunications Corporation; Nextel Communications, Inc.; Omnipoint Corporation, Oracle Data Publishing, Inc., and McCaw Cellular Communications, Inc.; Omnipoint Mobile Data Company; Pacific Bell; PacTel Corporation; PageMart, Inc.; Panhandle Telephone Cooperative, Inc.; PCN America, Inc.; PCN Communications, Inc.; PerTel, Inc.; Personal Communications Network Services of New York; Pulson Communications Corporation; Qualcomm Incorporated; Satcom, Inc.; Sharecom-Austin, L.P.; SM Tek, Inc.; Southwestern Bell Personal Communications, Inc.; Spatial Communications; Suite 12 Group; Tele-Communications, Inc.; Tel/Logic Inc.; Telmarc Telecommunications; Time Warner Telecommunications, Inc.; TRX Transportation Telephone Co.; US West NewVector Group, Inc.; Vanguard Cellular Systems, Inc.; and Viacom International, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Separate Statement of Commissioner James H. Quello

In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services

I support the decision to award a pioneer's preference to American Personal Communications (APC), Cox Enterprises, Inc. (Cox), and Omnipoint Communications, Inc. (Omnipoint). Each of these entities have contributed significantly to the development of Personal Communications Service (PCS) technology. Awarding these pioneer's preferences will facilitate the deployment of PCS services to the public.

Since the initiation of the personal communication service docket, Congress has changed the rules on the procedures the Commission may use to award licenses. In addition to comparative hearings and lotteries, Congress gave the Commission the authority to license PCS and other services through competitive bidding (auctions) and the Commission has determined that competitive bidding will be used to award PCS licenses. Additionally, the Commission sought comment on how the issue of pioneer's preference should be addressed in a competitive bidding environment.

Today's decision to award three pioneer's preferences in the personal communications service is one of several options the Commission could have taken. For example, the Commission could have awarded the 20 MHz Basic Trading Area (BTA) to the tentative selectees; however, such action would have limited rural telephone companies, small businesses and businesses owned by women and minorities from participating in the offering of PCS services in the New York, Washington, D.C., and Los Angeles areas. Another approach would have had the Commission divide one of the Major Trading Areas (MTA) into BTAs and award the BTAs to the tentative selectees. Such an approach would have been inconsistent with the Commission's PCS allocation scheme and would likely have required another rulemaking. Alternatively, the Commission could have determined that under the competitive bidding scenario the tentative selectees pay a discounted price for spectrum, an option that the Commission may want to consider prospectively. Finally, the Commission could have determined that with competitive bidding, there is no longer a need for pioneer's preferences in the PCS proceeding.

Today's decision is one of fairness and equity. The tentative selectees have invested significant sums of money to further the development of PCS. Furthermore, the tentative

Separate Statement

of

Commissioner Andrew C. Barrett

Re: Third Report and Order in Pioneer Preference for Broadband Personal Communications Services

This Third Report and Order terminates the pioneer preference decision in the Commission's broadband Personal Communications Services [PCS] docket. I support this item because I believe the Commission has a responsibility to fulfill its regulatory responsibilities after creating rules to implement regulations such as pioneer preference. Going forward, I believe the record in the review of our pioneer preference supports the retention of pioneer preference rules in future dockets. To date, I believe our pioneer preference rules have spawned innovative efforts from smaller companies, who might otherwise be precluded by the delay and expense of our experimental licensing and rulemaking processes. Small companies continue to provide innovation in every aspect of our efforts to implement new wireless services and competitive network alternatives. Thus, I believe these rules should be retained, and modified where appropriate, in order to ensure that companies, large and small, engage in a full public dialogue on the innovative services or technologies which they propose to the FCC and the consumer public. The net gain to our public policy and regulatory decisions provided by our pioneer preference rules outweighs the risks identified by various parties in this proceeding.

Separate Statement
of
Commissioner Ervin S. Duggan

Re: Review of the Pioneer's Preference Rules, ET Docket No. 93-266, First Report and Order; Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 et al., Third Report and Order.

It is no secret that I have long been a skeptic about the wisdom of the FCC's pioneer's preference policy. In this review docket, which sought to confront concerns about whether the pioneer's preference policy made sense in connection with our new auction authority, the proponents of pioneer's preferences have convinced me that the policy has indeed spurred innovation and investment in new technology. I therefore support retaining the pioneer's preference policy, at least for existing tentative selectees. If sparingly awarded, such preferences should help generate the technological innovation that the Commission hoped for when it created the policy.

I always granted that the pioneer's preference policy was noble in concept. My concerns have been limited to the practical difficulties that could arise in implementing the policy. At the outset, I identified several potential dangers: the danger of politicizing awards; the danger of making difficult, hair-splitting decisions about what constitutes true innovation; and finally, the danger of being caught up in endless litigation, which obviously might slow, rather than speed, the commercial advent of new technologies.[1]

The commenters in this proceeding and our actual experience, however, suggest to me that the benefits of the pioneer's preference policy outweigh the dangers it may threaten, at least with respect to those proceedings in which the FCC already has reached tentative or final decisions. And I grant that a decision to award preferences here is true to the expectations that the Commission created when it established the pioneer's preference scheme: that innovators would be rewarded with the grant of a license enabling them to use and profit from their innovations.

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[1] See Amendment of the Commission's Rules to Establish New Personal Communications Services (GEN Docket No. 90-314), Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794, 7815 (1992); Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services (GEN Docket No. 90-217), Report and Order, 6 FCC Rcd 3488, 3500 (1991).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 7, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AN AMENDMENT TO BELL ATLANTIC'S ONA PLAN

CC Docket No. 88-2, Phase I

On January 21, 1994, Bell Atlantic filed an Amendment to its Open Network Architecture (ONA) Plan to add Video Dial Tone service as a new special access ONA Basic Serving Arrangement (BSA). Pursuant to Commission rules, each Bell Operating Company (BOC) is required to file an amendment to its ONA Plan if the BOC plans to offer an enhanced service that uses a BSA, Basic Service Element, or a Complementary Network Service other than those listed in the BOC's approved ONA Plan. (*See BOC ONA Amendment Order*, 6 FCC Rcd 7646, 7654 at para. 13.)

Bell Atlantic states that it intends to provide Video Dial Tone service to affiliated and nonaffiliated video enhanced service providers to permit them to offer video programming to the public. Bell Atlantic states that Video Dial Tone, which is being tariffed at the federal level, will provide the transport capability to enable video programmers to transmit video programming to end users' premises. Bell Atlantic states that the service consists of transport facilities and access connecting the video programmer's location to Bell Atlantic's Video Dial Tone service office and equipment and to end-user video programming subscribers. Bell Atlantic also states that its proposed Video Dial Tone service will offer video programmers a choice of up to three service options.

On March 2, 1994, Bell Atlantic filed an *ex parte* letter clarifying its Amendment. In its letter Bell Atlantic describes its compliance with the Commission's ONA requirements.

Interested parties may file comments on this amendment by **March 28, 1994**, and reply comments by **April 7, 1994**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the amendment can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS Communications, Inc.

For Authority, Pursuant to Section 214 of the Communications Act of 1934, As Amended, to Provide Non-Interconnected Private Line Services Between the United States and Brazil, Ireland, Singapore and the United Kingdom — File No. ITC-94-082

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 4, 1994; Released: March 16, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international private lines for the provision of international non-interconnected private line services[1] to the general public by LDDS Communications, Inc. ("LDDS").[2]

2. Accordingly, IT IS ORDERED that application file I-T-C-94-082 IS GRANTED and LDDS is authorized to resell international private lines not interconnected to the public switched network for the provision of international private line services between the United States and Brazil, Ireland, Singapore and the United Kingdom.[3]

3. IT IS FURTHER ORDERED that LDDS is authorized to lease and operate a one-half interest in up to sixty-five 56/64 kpbs circuits, as specified in Appendix A, for the provision of non-interconnected private line services, pursuant to the tariffs of authorized U.S. international carriers.[4]

4. IT IS FURTHER ORDERED that neither LDDS nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which LDDS or any such persons or companies controlling or controlled by LDDS are parties.

5. IT IS FURTHER ORDERED that LDDS shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized herein.

6. IT IS FURTHER ORDERED that LDDS shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's rules, 47 C.F.R. § 43.61.

7. IT IS FURTHER ORDERED that LDDS shall file with the Commission a copy of any operating agreements entered into with foreign correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's rules, 47 C.F.R. § 43.51.

8. IT IS FURTHER ORDERED that LDDS shall file semi-annual reports of circuit additions, pursuant to Section 63.15(b) of the Commission's rules, 47 C.F.R. § 63.15(b).

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[1] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not result in the unilateral diversion of U.S. inbound switched traffic to private lines, and thus, exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. *See Regulation of International Accounting Rates*, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 559 (1992). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nevertheless, the Commission confirmed the right of an end user to interconnect its international private lines to the public switched network, through, for example, its own private branch exchange. *See Regulation of International Accounting Rates*, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992) (*"Phase II Third Further Notice"*).

[2] LDDS doing business as LDDSMetromedia Communications is a publicly-held company organized under the laws of Georgia. Less than two percent of LDSS' voting shares are owned by aliens. LDDS is planning to provide international data services over the private lines authorized in this Order.

[3] We note that should LDDS obtain any interest in facilities beyond each authorized international point for providing common carrier services, including private line service between the United States and other international points, such action would constitute an extension of lines under Section 214 of the Communications Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for LDDS to file an additional application for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[4] LDDS proposes to resell private lines under MCI's FCC Tariff Nos. 1 and 2; MCI/OTI's FCC Tariff Nos. 1 and 2; MCI/WU's FCC Tariff Nos. 20 and 27; and Sprint's FCC Tariff Nos. 1, 2, 5 and 7.

9. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

10. IT IS FURTHER ORDERED that our authorization of the applicant to provide non-interconnected private line services is limited to the provision of such private lines only between the United States and each of the international points specified in Appendix A -- that is, private line services which originate in the United States and terminate in one of the international points specified in Appendix A or which originate in one of the international points specified in Appendix A and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

11. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services LDDS seeks authority to provide. The transmission of money is not considered to be a common carrier service.

12. This Order is issued under Section 0.291 of the Commission's rules, and is effective upon adoption. Petitions for reconsideration under Section 1.106 and applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this Order. (*See* 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Country	56/64 Circuits
Brazil	20
Ireland	10
Singapore	5
United Kingdom	30

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WilTel, Inc. File No. I-T-C-94-092

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 4, 1994; Released: March 16, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by WilTel, Inc. (WilTel).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-092 IS GRANTED, and WilTel is authorized to provide international switched voice services by reselling, pursuant to contract, the international switched voice services of its affiliate WilTel International, Inc. between the U.S. and international points listed in the contract;

3. IT IS FURTHER ORDERED that WilTel is not authorized to resale any other services, including private line services, that WilTel International is authorized to provide.

4. IT IS FURTHER ORDERED that:

(a) WilTel shall file publicly the contracts entered into with WilTel International or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. § 203, and the *Interexchange Order*;[1]

(b) the services obtained by WilTel shall be made generally available to similarly situated customers at the same terms, conditions and rates.

5. IT IS FURTHER ORDERED that WilTel shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that WilTel shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that WilTel shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that neither WilTel nor any persons or companies directly or indirectly controlling or controlled by WilTel, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which WilTel or any persons or companies controlling or controlled by WilTel are parties.

9. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services WilTel seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991) (*Interexchange Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TransLine Communications, Inc. File No. I-T-C-94-024

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to Resell Services of Other Common Carriers to Provide Resold Switched and Private Line Services

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 7, 1994; Released: March 16, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international private lines for the provision of non-interconnected international private line services[1] and the resale of international switched services to the general public by TransLine Communications, Inc. (TransLine).

2. Accordingly, IT IS ORDERED that application File I-T-C-94-024 IS GRANTED and TransLine is authorized to resell international switched services between the United States and various international points.[2]

3. IT IS FURTHER ORDERED that TransLine is authorized to lease and operate up to twenty-four (24) 64-Kbps equivalent circuits from authorized U.S. common carriers[3] for the provision of non-interconnected international private line services between the United States and the United Kingdom.[4]

4. IT IS FURTHER ORDERED that neither TransLine nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which TransLine or any such persons or companies controlling or controlled by TransLine are parties.

5. IT IS FURTHER ORDERED that TransLine shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that TransLine shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that TransLine shall file semi-annual reports of circuit additions pursuant to Section 63.15 of the Commission's Rules 47 C.F.R. §63.15(b).

8. IT IS FURTHER ORDERED that TransLine shall file with the Commission a copy of any operating agreement entered into with foreign correspondents within thirty (30) days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

9. IT IS FURTHER ORDERED that our authorization of TransLine to resell international private lines for the provision on non-interconnected private line service is limited to the provision of such private line service between the United States and the United Kingdom -- that is, private lines which carry traffic that originates in the United States and terminates in the United Kingdom, or originates in the United Kingdom and terminates in the United States. In addition, TransLine may not -- and TransLine's tariffs must state that its customers may not -- connect

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[1] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not result in the unilateral diversion of U.S. inbound switched traffic to private lines, and thus, exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates*, CC Docket 90-337, *Phase II First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for the provision of private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (Phase II Third Further Notice), 7 FCC Rcd 7927 (1992)).

[2] TransLine states that it will obtain the necessary capacity pursuant to tariffs of the underlying carriers authorized to provide international switched services as set forth in AT&T Tariffs F.C.C. Nos. 1 and 2; MCI Tariff F.C.C. No. 1; and WilTel Tariff F.C.C. No. 2.

[3] TransLine states that it will obtain the necessary capacity pursuant to IDB's Tariff F.C.C. No. 2.

[4] TransLine will initially employ one (1) 64 kbps equivalent circuit between New York City and London. TransLine estimates future international private line circuit requirements between New York City and London to be as follows:

Year 1: 128 kbps (2 circuits)

Year 2: 256 kbps (4 circuits)

Year 3: 512 kbps (8 circuits)

Year 4: 768 kbps (12 circuits)

Year 5: 1.544 full T-1 or 2 Meg E-1 (24 circuits)

private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking (Third Further Notice)*, 7 FCC Rcd 7927 (1992), *fONOROLA Corporation and EMI Communications Corporation (fONOROLA/EMI Order)*, 7 FCC Rcd 7312 (1992), *petition for reconsideration pending.*

10. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

11. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services TransLine seeks authority to provide. The transmission of money is not considered to be a common carrier service.

12. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 16, 1994

IN THE MATTER OF ALLTEL SERVICE CORPORATION, PETITION FOR WAIVER OF DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, SUBPART H, APPENDIX-GLOSSARY OF THE COMMISSION'S RULES AAD 94-29

Comments: April 19, 1994
Reply Comments: May 10,1994

On February 28, 1994, ALLTEL Service Corporation, on behalf of its telephone operating affiliates, Texas ALLTEL, Inc. and ALLTEL Texas, Inc., filed a petition for waiver of the definition of "study area" as set forth in Part 36, Subpart H, Appendix-glossary of the Commission's Rules. This waiver would allow the consolidation of ALLTEL-Texas' study area with that of Texas-ALLTEL's study area in conjunction with the merger of the two companies.

Parties may file comments on this petition no later than **April 19, 1994**. Replies should be filed by **May 10, 1994**. Comments should reference AAD 94-29. An original and four(4) copies of each pleading should be sent to the Federal Communications Commission, Secretary, Room 222, 1919 M Street, N.W., Washington, D.C. 20554. A copy of each pleading should also be sent to Adrian Wright, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20037, (202) 857-3800. Copies are available for inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., room 812, Washington D.C. Copies are also available from (ITS).

For further information contact Adrian Wright at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-231

In the Matter of

Amendment of Section 73.202(b),	RM-5094 RM-6706
Table of Allotments,	RM-5381 *RM-7325*
FM Broadcast Stations.	RM-5604 RM-7372
Shreveport, Bastrop, Homer,	RM-6406 RM-7459
Mansfield, Ruston, Vivian and	
Jonesboro, Louisiana, El Dorado	
and Stamps, Arkansas, Atlanta,	
Henderson, Hooks, and San	
Augustine, Texas.	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 3, 1994; Released: March 16, 1994

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Extraordinary Relief filed by DeSoto Broadcasting Corporation ("DeSoto Broadcasting") directed to the *Third Report and Order* in this proceeding. 7 FCC Rcd 470 (1992). Cary D. Camp and Russ Robinson filed Oppositions to the Petition for Extraordinary Relief. DeSoto Broadcasting filed a Consolidated Reply to the Oppositions. For the reasons discussed below, we dismiss the Petition for Extraordinary Relief.

BACKGROUND

2. The *Third Report and Order* in this proceeding involved multiple allotment proposals at thirteen different communities. With respect to Mansfield, Louisiana, DeSoto Broadcasting, licensee of Station KJVC, Channel 224A, Mansfield, Louisiana, filed a Petition for Rule Making proposing the substitution of Channel 284C3 for Channel 224A, and modification of its Station KJVC license to specify operation on Channel 284C3. Since the Mansfield upgrade proposal conflicted with a Channel 285C3 upgrade proposal for Jonesboro, Louisiana, in this proceeding, the DeSoto Broadcasting Petition for Rule Making was considered as a timely filed counterproposal.[1]

3. In response to the Public Notice announcing the acceptance of the Mansfield counterproposal, Russ Robinson filed an expression of interest in a Channel 284C3 allotment at Mansfield. Because we were unable to allot another Class C3 allotment to Mansfield to accommodate this expression of interest, we could not grant DeSoto Broadcasting's petition proposing to upgrade the Station KJVC license in accordance with Section 1.420(g) of the Rules. Instead, we allotted Channel 284C3 to Mansfield for general application. We received three applications for this allotment.[2]

4. In its Petition for Extraordinary Relief, DeSoto Broadcasting contends that the expression of interest filed by Russ Robinson was defective and should not have been considered in this proceeding. As such, DeSoto Broadcasting argues that the *Third Report and Order* should have modified its Station KJVC license to specify operation on Channel 284C3 instead of allotting this channel for general application. Therefore, DeSoto Broadcasting now requests that its application be granted and the two mutually exclusive applications be dismissed.

5. On December 30, 1993, we granted the DeSoto Broadcasting application for Channel 284C3 in Mansfield. That action is now final. In view of that action, the Petition for Extraordinary Relief is moot and need not be considered.

6. Accordingly, IT IS ORDERED, That the aforementioned Petition for Extraordinary Relief filed by DeSoto Broadcasting Corporation IS HEREBY DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 635-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] In the *Third Report and Order*, we allotted Channel 284C3 to Mansfield with a site restriction of 18.9 kilometers (11.7 miles) southwest. This site restriction coupled with a similar site restriction for the Channel 285C3 proposal at Jonesboro enabled us to make both allotments.

[2] Along with the DeSoto Broadcasting application (File No. BPH-920324ME), Cary D. Camp (File No. BPH-920402MI) and Mitchell Tyner (File No. BPH-920402MI) filed applications for this allotment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-68

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Paradise Valley, Arizona) — RM-8130

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 9, 1994; Released: March 16, 1994

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 2224 (1993), issued in response to a petition filed on behalf of Scottsdale Talking Machine & Wireless Company, Inc. ("petitioner"), permittee of Station KXLL(FM), Channel 290A, Paradise Valley, Arizona, proposing the substitution of Channel 290C3 for Channel 290A and modification of its authorization accordingly. Petitioner filed comments in support of the proposal reiterating its intention to apply for Channel 290C3 if allotted to Paradise Valley. No other comments were received.

2. We believe the public interest would be served by substituting Channel 290C3 for Channel 290A at Paradise Valley since it could provide the community with an expanded coverage area FM service.

Technical Statement

3. As stated in the *Notice*, Channel 290C3 can be allotted to Paradise Valley at the site specified in the construction permit issued for Station KXLL(FM) at coordinates 33-32-30 and 111-57-12 (File No. BPH-870909MF).[1] [2] Additionally, as Paradise Valley is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government in this proposal was obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective May 2, 1994, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Paradise Valley, as follows:

City	Channel No.
Paradise Valley, Arizona	290C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Scottsdale Talking Machine & Wireless Company, Inc. for Station KXLL(FM), Paradise Valley, Arizona (File No. BPH-870909MF), IS MODIFIED to specify operation on Channel 290C3 in lieu of Channel 290A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Scottsdale Talking Machine & Wireless Company, Inc., permittee of Station KXLL(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Paradise Valley, Arizona.

7. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Order* to the licensee of Station KEDJ(FM), Sun City, Arizona, as follows: Resource Media, Inc., Radio Station KEDJ(FM), 7401 W. Camelback Road, Phoenix, Arizona 85033.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

[1] We note that Channel 290C3 at Paradise Valley would be short spaced to Station KEDJ(FM) (formerly Station KONC-FM), Channel 292A, Sun City, Arizona, at coordinates 33-36-05 and 112-17-31. However, Station KEDJ(FM) was modified to specify operation on Channel 292C2 in MM Docket No. 92-66. *See* 8 FCC Rcd 796 (1993). Therefore, the grant of an authorization for Channel 290C3 at Paradise Valley, Arizona, may be withheld until Station KEDJ(FM) is authorized on Channel 292C2 at Sun City. We will serve a copy of this *Report and Order* on the licensee of Station KEDJ(FM).

[2] The *Notice* advised that the grant of the petitioner's construction permit application (File No. BPH-870909MF), 6 FCC Rcd 1668 (I.D. 1991), *aff'd.*, 6 FCC Rcd 4185 (Rev. Bd. 1991), *aff'd.*, 7 FCC Rcd 4422 (1991), had been appealed to the D.C. Circuit, *Hope Valley FM Limited Partnership v. F.C.C.*, Case No. 92-1355, and that grant of its modification request would be conditioned on the outcome of that appeal. Since the Court affirmed the Commission's decision by judgment on December 1, 1993, and no further judicial review was requested by Hope Valley, no condition is necessary.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comsat Corporation – Comsat World Systems — Transmittal Nos. 20 and 22

Tariff F.C.C. No. 1

ORDER

Adopted: March 3, 1994; Released: March 4, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On January 6, 1994, Comsat Corporation -- Comsat World Systems (Comsat) filed Transmittal No. 20 to expand its Tariff F.C.C. No. 1 to include general regulations for the lease of Full-Period Television Through Service between the United States and foreign locations. This transmittal also establishes a specific rate and other terms of service applicable to a five-year lease of this preemptible, digital video service. The five-year lease would involve use of 54 MHz of available bandwidth from a hemi-beam transponder on one of INTELSAT'S satellites to provide this through service between the United States and Argentina. Transmittal 20 is scheduled to become effective March 6, 1994.[1] Transmittal No. 20, Description and Justification at 1.

2. On January 21, 1994, PanAmSat, L.P. (PanAmSat) filed a petition to reject or, alternatively, to suspend and investigate Comsat Transmittal 20. Comsat filed a reply on January 31, 1994.[2]

3. PanAmSat contends that Transmittal 20 should be rejected because it does not include sufficient cost support for the proposed 54 MHz five-year lease rate, noting that the 54 MHz lease rate is inconsistent with Comsat's rates for other lease sizes. PanAmSat Petition at 5-6. Comsat replies, *inter alia*, that its proposed lease rate for the 54 MHz service was developed in accordance with the methodology used in earlier transmittals by Comsat and that all of its currently effective pre-April 1, 1993 lease transponder rates for 9 MHz or greater were developed using that same methodology. Comsat then explains in its reply how it derived the proposed lease rate for the 54 MHz service. Comsat Reply at 6. *See also* Comsat Letter.

4. PanAmSat also contends that, in violation of Section 202 of the Communications Act, 47 U.S.C. § 202, Comsat offers a "new" service in Transmittal 20 to a single customer under terms not available to other Comsat customers. PanAmSat Petition at 1-3. Comsat replies that because the reservation request for this particular service was made prior to an April 1993 cut-off date contained in its tariff,[3] Comsat correctly applied the pre-April 1993 tariffed terms. Comsat Reply at 2-3.[4]

5. Finally, PanAmSat contends that, contrary to the Commission's rules, Comsat's Transmittal 20 omits a material term: the power level for Comsat's 54 MHz digital video service. Absent such information, PanAmSat argues, the fairness of Comsat's charges and the adequacy of Comsat's offering to meet specific customer needs cannot be determined. PanAmSat Petition at 3-5. Comsat responds that its transmittal implicitly incorporates by reference all relevant provisions in Comsat Tariff No. 1 and that, included among those provisions, is a reference to an INTELSAT document from which the power level can be calculated. Comsat Reply at 4-5.

6. The Tariff Division has reviewed the above transmittals and all associated submissions. We conclude that no compelling argument has been presented that the tariff transmittal, as revised, is so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the "Motion for Acceptance of Response" filed by PanAmSat, L.P., IS DENIED and the accompanying "Response to Reply of Comsat Corporation" IS DISMISSED.

8. IT IS FURTHER ORDERED that the "Request to Strike" filed by Comsat Corporation IS GRANTED.

9. IT IS FURTHER ORDERED that the petition to reject or to suspend and investigate Comsat Corporation -- Comsat World Systems Tariff F.C.C. No. 1, Transmittal No. 20, filed by PanAmSat, L.P., Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] On February 28, 1994, Comsat filed Transmittal No. 22, also effective March 6, 1994, to clarify the terms of its offering under Transmittal 20. Subsequently, Comsat filed additional cost support. Letter from A. Lim, General Attorney, Comsat, to G. Vogt, Chief, Tariff Division, Common Carrier Bureau (March 1, 1994) (Comsat Letter).

[2] On February 14, 1994, PanAmSat filed a pleading captioned, "Response to Reply of Comsat Corporation," and an accompanying, "Motion for Acceptance of Response." On February 22, 1994, Comsat filed a pleading captioned, "Request to Strike," seeking dismissal of both PanAmSat's original opposition and PanAmSat's subsequent "Response to Reply." We deny PanAmSat's motion, grant Comsat's request to strike, and dismiss PanAmSat's "Response to Reply" because such a response is not permitted under our rules. *See* Section 1.45(c) of the Commission's Rules, 47 C.F.R. § 1.45(c).

[3] Comsat has two sets of rates and other terms for its preemptible digital video service: an "old" set for service taken or reserved prior to April 1, 1993, and a "new" set for service taken or reserved after that date.

[4] Documents referred to in Comsat's Reply and for which confidential treatment was sought were not considered and have been returned to Comsat.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 6471
Tariff F.C.C. No. 1

ORDER

Adopted: March 7, 1994; Released: March 7, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On February 8, 1994, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice. This filing introduces a new Software Defined Network Term and Volume Plan. The transmittal is currently scheduled to take effect on March 8, 1984.[1]

2. On February 14, 1993, Tel-Save, Inc. (Tel-Save) and The Furst Group, Inc. (Furst) jointly filed a petition to reject, or to suspend and investigate, Transmittal No. 6471. AT&T filed a reply on February 17.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 6471 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 6471, filed jointly by Tel-Save, Inc. and the Furst Group, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] On March 4, 1994, AT&T filed Application No. 1873, clarifying that certain provisions of the tariff will be available to Tariff 15 or SDN Contract Tariff customers who order SDN Service prior to April 30, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 8, 1994

COMMON CARRIER BUREAU ESTABLISHES DATA BASE FOR PUBLIC USE IN THE PRICE CAP PERFORMANCE REVIEW FOR LOCAL EXCHANGE CARRIERS (CC DOCKET NO. 94-1)

The Common Carrier Bureau has established a computerized data base for use in the Price Cap Performance Review for Local Exchange Carriers (CC Docket No. 94-1). This data base is located in the Industry Analysis Division's "FCC-State Link Bulletin Board System" (RBBS-PC), in a directory entitled "PRICECAP."

This 24-hour bulletin board is restricted to FCC use from 9:30 am - 10:30 am and 1:00 pm - 1:30 pm EST, Monday through Sunday. From 8:00 am - 9:30 am and 10:30 am to 1:00 pm EST, Monday through Sunday, regulatory commissions and other government agencies are priority users and, therefore, the system is not available to other users during those hours. The board is available to the public (as well as government users) from 1:30 pm - 8:00 am EST, Monday through Sunday.

This computerized bulletin board can be accessed by using a computer and modem and calling (202) 632-1361. Users can transfer information on the use of this board to their computers by selecting first, the "FILE" command from the "MAIN" menu, second, the "DOWNLOAD" command from the "FILE" menu and third, the "RBBS-PC. REF" file in the "BBS" directory of the bulletin board. Users should refer to their communications package for instructions on how to transfer the file to the users' computer system. Information on various aspects of this board can be found by selecting first, the "BULLETIN" command from the "MAIN" menu and, second, the "INFO" bulletin from the list of bulletins. In-depth information about commands, menus, and special topics can be found by selecting the "HELP" command, which is available in all menus. Specific questions can be sent to the System Operator by first, selecting the "COMMENT TO SYSOP" command from the "MAIN" menu, second, typing in a message containing the question and third, selecting the "SAVE MESSAGE" command. The System Operator's response to these questions can be retrieved by selecting the "READ MESSAGE" command from the "MAIN" menu.

As noted in the Notice of Proposed Rulemaking initiating the price cap performance review for the Local Exchange Carriers, the Commission is using this proceeding as a test of methods to improve the ability of the Commission and the public to review and evaluate data and information through the use of computerized data bases. *See Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, CC Docket No. 94-1, FCC 94-10 (released Feb. 16, 1994) (*NPRM*). We therefore encourage all commenters to submit, in addition to the required paper copies (*see NPRM* at para. 107), a copy of their comments and reply comments on IBM-PC compatible diskettes to: (1) the Secretary, Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554 and (2) the Commission's copy contractor, International Transcription Services, Inc., Room 246, 1919 M Street, N.W., Washington, D.C. 20554, Attn. Wilbur Thomas. Each diskette submitted to the Office of the Secretary should be labelled CC Docket No. 94-1, Attn. Adrianne Brent, Industry Analysis Division. All diskettes should be submitted with text files in two formats, one compatible with WordPerfect 5.1 or 4.2 and one in ASCII, and with spreadsheets in a Lotus 1-2-3 WK1 or WK3 file, so that they may be included in the data base. All *ex parte* statements and replies to *ex parte* statements should be filed in this same manner.

In the *NPRM*, the Commission identified a number of issues for comment. Each issue is categorized as a "General," "Baseline," or "Transition" issue. In addition, each issue is assigned a number, and some of the issues also are assigned a letter. For example, the first issue identified for comment in the *NPRM* is "General Issue 1"; the third issue identified for comment is "Baseline Issue 1a"; the last issue identified for comment is "Transition Issue 6." In responding to an issue identified for comment in the *NPRM*, commenters should specifically reference the category, number, and where applicable, the letter that corresponds to the issue. Further, the category, number, and letter of the issue should precede the corresponding comments. Comments filed in this format should improve the Commission and the public's ability to review and evaluate data and information submitted in this docket.

The *NPRM* provides that comments in this docket are due on April 18, 1994, and replies are due on May 17, 1994. In order to facilitate the creation of useful data bases in this and other Commission proceedings, we encourage comments and suggestions for improvements to these procedures.

For further information regarding the operation of the bulletin board, call Adrianne Brent or Jonathan Kraushaar, Industry Analysis Division, (202) 632-0745. For further information about the *NPRM*, call Joanne Wall, Tariff Division, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION, WESTERN UNION INTERNATIONAL, INC., and TELECOM*USA, INC.,
Complainants,

v.

CHILLICOTHE TELEPHONE COMPANY,
Defendant.

File No. E-93-124

ORDER

Adopted: March 3, 1994; Released: March 17, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 28, 1993, MCI Telecommunications Corporation, Western Union International, Inc., and Telecom*USA, Inc. (collectively MCI) filed the above-captioned complaint against Chillicothe Telephone Company (Chillicothe) seeking damages resulting from Chillicothe's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On February 25, 1994, however, MCI and Chillicothe filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS, INC.,
LDDS COMMUNICATIONS, INC. d/b/a
LDDSMETROMEDIA COMMUNICATIONS,
SCHNEIDER COMMUNICATIONS, INC.,
TELEDIAL AMERICA, INC.
Complainants,

v.

AMERITECH TELEPHONE OPERATING COMPANIES,
Defendants.

File No. E-93-122

ORDER

Adopted: March 11, 1994; Released: March 17, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 24, 1993, Teledial America, Inc. (Teledial), along with several other complainants, filed the above-captioned complaint against the Ameritech Telephone Operating Companies (Ameritech)[1] seeking damages resulting from Ameritech's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On March 3, 1994, however, Teledial and Ameritech filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the parties' Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE to the extent that it relates to the claims and requests for relief of Teledial America, Inc.

[1] The Ameritech Telephone Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-306

In the Matter of

WESLEY COLLEGE

Licensee of Station WCSP(AM),
Crystal Springs, Mississippi

Order to Show Cause Why the
License for Station WCSP(AM),
Crystal Springs, Mississippi,
Should Not Be Revoked

ORDER

Adopted: February 24, 1994; Released: March 18, 1994

By: Chief, Mass Media Bureau

1. This proceeding commenced on December 29, 1993, when the Assistant Chief, Audio Services Division, Mass Media Bureau, by delegated authority, released *Order to Show Cause and Hearing Designation Order*, 9 FCC Rcd 99 (MMB 1993) (*"Show Cause Order"*). The *Show Cause Order* directed Wesley College, licensee of Station WCSP(AM), Crystal Springs, Mississippi, to show cause why the license for Station WCSP(AM) should not be revoked.

2. The *Show Cause Order* specified issues to determine whether Wesley College had the capability and intent to expeditiously resume broadcast operations of WCSP(AM); to determine whether Wesley College had violated Sections 73.1740 (Minimum Operating Schedule) and/or 73.1750 (Discontinuance of Operation) of the Commission's Rules; and to determine, based on the evidence adduced pursuant to the foregoing issues, whether Wesley College is qualified to be and remain the licensee of WCSP(AM).

3. By *Memorandum Opinion and Order*, FCC 94M-52 (released February 2, 1994), the Presiding Judge terminated the hearing proceeding and, pursuant to § 1.92(c) of the Commission's Rules, certified the case to the Commission. The Presiding Judge did so based on the fact that Wesley College had, by letter dated July 23, 1993, returned the WCSP(AM) license to the Commission and requested its cancellation. Although the College's request for cancellation of the WCSP(AM) license predated the adoption of the *Show Cause Order*, the correspondence was not considered prior to designation for hearing.

4. As a consequence of Wesley College's voluntary action relinquishing the WCSP(AM) license, we will grant its requested relief. However, it will be imperative to the safety of air navigation that Wesley College maintain the prescribed painting and illumination of all WCSP(AM) towers until the towers are dismantled.

5. ACCORDINGLY, IT IS ORDERED, That the authority of Wesley College to operate Station WCSP(AM), Crystal Springs, Mississippi, is hereby CANCELLED.

6. IT IS FURTHER ORDERED, That the call sign for Station WCSP(AM) is hereby DELETED.

7. IT IS FURTHER ORDERED, That, pursuant to Section 303(q) of the Communications Act of 1934, as amended, Wesley College SHALL MAINTAIN ALL TOWERS for Station WCSP(AM) until they are dismantled in accordance with the Commission's rules and the terms of the cancelled WCSP(AM) license. 47 U.S.C. Section 303(q); *see also*, C.F.R. Part 17 and Section 73.1213.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. IT IS FURTHER ORDERED, That a copy of this *Order* shall be sent by Certified Mail - Return Receipt Requested to:

Dr. Samuel K. Bruce
President
Wesley College
P.O. Box 1070
Florence, Mississippi 39073-0070

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-297

In the Matter of

Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service — RM-7872; RM-7722

SECOND NOTICE OF PROPOSED RULEMAKING

Adopted: January 19, 1994; Released: February 11, 1994

Comment Date: To be established; see paragraph 58.
Reply Comment Date: To be established; see paragraph 58.

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. This Second Notice of Proposed Rulemaking addresses comments filed in response to the Commission's proposal to redesignate the 28 GHz band (27.5 - 29.5 GHz) from terrestrial point-to-point services, to terrestrial point-to-multipoint services.[1]

2. In this action, we modify our prior proposal. In order to develop regulations for the use of the 28 GHz band that optimize the public interest benefits to the Nation, we issue concurrently with this action a public notice requesting comments regarding the establishment of a Negotiated Rulemaking Committee (NRMC). In particular, we seek to have the NRMC develop technical regulations reflecting a consensus determination whether proposed terrestrial and satellite uses can share, on a co-frequency and co-coverage area basis, the 28 GHz band. In the event that sharing is not possible for some of the proposed uses of the 28 GHz band, we request that parties provide detailed analyses of the costs and benefits of the various choices we can make for the use of this band.

3. All other issues pertaining to establishment of LMDS will await development of frequency coordination and sharing criteria for space and terrestrial services and technical parameters for the service.

II. BACKGROUND

4. In the NPRM, the Commission considered three petitions for rulemaking proposing a redesignation of the 28 GHz band. That band currently is designated for fixed point-to-point and fixed satellite service use. We found that redesignation of the point-to-point use of the band to point-to-multipoint use could stimulate greater use of a band that largely has lain fallow. However, we asked for comment from satellite entities regarding the effect of redesignation on any proposed fixed satellite use of the band.

5. As requested by the petitions for rulemaking from Suite 12 and Video/Phone, we proposed that the 28 GHz band initially be licensed in two 1000 MHz blocks to two different carriers. Since it appeared that video service initially would be the primary service offered in LMDS, we proposed to divide each of the 1000 MHz bands into 50 channels of 20 MHz each.[2] We also proposed allowing licensees to provide a wide variety of other services.

6. We sought comment on whether other assignment schemes might better meet our objectives. We gave one example of a different assignment scheme, *i.e.* four blocks, two of which would have the capacity to carry 34 video channels, and two of which could be used for smaller video systems or telecommunications systems.

7. Finally, we requested comment on whether a separate assignment would be specifically required to accommodate the proposed satellite service applications in the Ka-band, or whether adequate coordination and sharing criteria could be developed to permit both terrestrial and fixed satellite services to operate compatibly in the band. We noted that the multicell multipoint configurations in the Suite 12 proposal envisioned a wide area distribution of services that might make frequency sharing with other services impossible.

III. DISCUSSION

A. Redesignation of the 28 GHz Band

1. Terrestrial technologies

8. Technological advances are making use of higher frequency bands possible. In the NPRM, we found that one of the petitioners for rulemaking in the 28 GHz band, Suite 12, appeared to have developed a technology that could lead to widespread use of that band. Suite 12's affiliate Hye Crest Management, Inc. (now CellularVision of New York or CVNY) had made use of experimental licenses and was given a standard license pursuant to waiver of the existing point-to-point rules in January, 1991 to provide a point-to-multipoint broadband video distribution service in the Brighton Beach area of New York City. We noted that CVNY had not yet shown market demand for its system in the New York City Primary Metropolitan Statistical Area (PMSA) for which it is licensed. Nevertheless, the more than 900 waiver applications we received from entities

[1] *See* Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, CC Docket No. 92-297, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd 557 (1993)(hereinafter NPRM).

[2] Suite 12's analog technology requires 20 MHz of bandwidth for each video distribution channel; an allocation of 1000 MHz per licensee gives a 50 channel capability in one polarization and 1000 MHz in the other direction to each licensee. Polarization is an electromagnetic radiation phenomenon which enables re-use of the same frequency if the transmission isolation between opposite polarization senses (*e.g.*, horizontal and vertical) is sufficiently high.

interested in providing the same type of service indicated that a significant market demand exists. Based on these applications, we found that there appears to be considerable commercial interest in using the spectrum for video distribution services, and we stated that a new source of competition to franchised cable companies, wireless cable companies, and other video service providers would further the public interest by promoting lower prices and new and innovative service offerings. We also noted that other uses of the 28 GHz technology were likely.

9. The majority of commenters and reply commenters support our finding of widespread interest in point-to-multipoint uses for the 28 GHz band. While some simply endorsed the proposal, others described in detail their plans for use of the band. Suite 12 states that the technology it proposes is capable of immediately providing interactive high quality video, voice, and data services. Suite 12 believes that LMDS will help meet the public demand for additional multichannel video programming and for two-way voice and data service. Suite 12 states that its system will compete with fiber cable services capable of delivering two-way interactive voice, video and data communications to the home; Suite 12 believes its system will benefit consumers with innovative service offerings at competitive prices. Suite 12 states that its system is capable of incorporating future technological advances such as high definition television and digital communications.

10. Video/Phone states that its Broadband NarrowBEAM Cellular Transmission Technology (BNCTT) will allow development of new, two-way broadband applications such as distance learning, telecommuting, telemedicine, videoconferencing at high speed data rates, business and professional television, halfduplex database services, and metropolitan area LAN interconnection. Video/Phone states that the lack of economical transmission capability at the local loop has hindered the growth of these services to date, which it believes would otherwise have been substantial. We interpret Video/Phone as promising that its system will benefit consumers with competitively priced, high-quality services with innovative applications for education, job training, health care and commercial telecommunications. Video/Phone plans to construct its system with a cellular frequency reuse pattern and make bandwidth available on demand based on customer needs. Another system developer is Gigahertz Equipment Company (GEC), which indicates that it is developing a digital system to provide video distribution in a cellular frequency reuse pattern. Many parties noted the potential for meaningful competition with franchised cable companies.

11. Other uses were discussed as well. Leaco noted that the long local loops required in its rural service area make fiber optics economically infeasible. It indicates that LMDS may be an economically practical broadband alternative for rural areas. Parties involved in public television are very interested in using the LMDS technology as last mile service in connection with the Clinton Administration's public policy goal of creating an information and education highway.[3]

2. Satellite technologies

12. The parties opposing redesignation of the 28 GHz band are primarily satellite entities, who argue that LMDS operations would cause unacceptable interference into fixed satellite services, including feeder links supporting mobile satellite service systems. Hughes and EMI state that LMDS should be assigned less spectrum than the two gigahertz proposed in the NPRM. NASA, Ameritech, Comsearch and Motorola Satellite argue that sharing may be difficult or impossible between satellite earth stations and LMDS omnidirectional formats, particularly if the service becomes ubiquitous in areas in which mobile satellite feeder links are located.

13. Most satellite entities indicate generally that although they currently do not use the Ka-band, they have been developing plans to use this band once the Ku and C bands are filled. NASA points out that its Advanced Communications Technology Satellite (ACTS) is intended to explore commercial satellite uses for the Ka-band, and that it is premature to reassign a portion of the band for terrestrial use just as commercial satellite uses are being developed. NASA requests that the entire Ka-band be reserved for satellite commercial applications. Motorola Satellite states it requires 100 MHz of spectrum in the Ka-band for its proposed Iridium Low Earth Orbit (LEO) satellite system feeder link uplinks.[4] Norris, Loral, and Calling also indicate that they may require some spectrum from this band for their fixed-satellite operations.[5] A number of commenters representing satellite interests noted that the 28 GHz band is allocated internationally to satellite as well as fixed services. Parties argue, *inter alia*, that the United States should, in keeping with international agreement, maintain the satellite assignment of this frequency band. The specific proposals of the satellite interests are discussed below.

a. FSS proposals

14. *NASA's ACTS Experiment.* NASA has requested that its experimental ACTS system be allowed to continue without interference from LMDS. NASA is operating ACTS under a frequency usage support agreement from National Telecommunications and Information Administration (NTIA), which is accorded experimental status with this Commission. Normally, our practice is not to 8 allow experimental licensees protection from interference. However, NASA requests that we protect its ACTS experimental services on the grounds that commercial uses for the spectrum are expected to grow directly from its experiments. NASA further supports its request noting that one billion dollars of taxpayer funds have been expended to bring this

[3] See, for example, comments of America's Public Television Stations, *et al.*, (Public TV).

[4] Motorola Satellite's comments requested 200 MHz of spectrum for its proposed system's feeder links. In the MSS Above 1 GHz Negotiated Rulemaking conducted earlier this year to assist the Commission developing technical rules and policies for the 1.6/2.4 GHz mobile-satellite service, Motorola Satellite indicated that 100 MHz of spectrum would be sufficient. *See* NPRM, 8 FCC Rcd at 558, note 2.

[5] After receiving authorization to use 29.5 - 30.0 GHz for its satellite uplinks, Norris petitioned us for authority to use 29.3 - 29.5 GHz as well. In our order denying this petition, we noted that Norris's operations in the 29.3 - 29.5 GHz band may conflict with LMDS, and we suggested that the issues pertaining to spectrum sharing between terrestrial LMDS and satellite uses should be resolved in the instant proceeding. *Norris Satellite Communications, Inc.*, -- FCC Rcd -- (1993) (FCC 93-341), paragraph 4.

experiment about. NASA has requested that we not redesignate the 28 GHz band for 5 years to allow sufficient time for satellite communications services to develop.

15. Key experimental ACTS technologies include fast hopping spot beam antennas, onboard processing, and dynamic rain fade compensation. The fast hopping spot beam technology will enable spectral reuse, allow higher communications rates, including the T-1 rate, with Very Small Aperture Terminals (VSATs), permit use of smaller earth stations (Ultra Small Aperture Terminals, USATs), and enable efficient capacity assignment to geographically variable traffic loads. Onboard processing will introduce the ability to switch and route (on the satellite) at the individual voice circuit level, enable single hop mesh voice networks, and provide improved signal-to-noise ratios. The ACTS program is also investigating aeronautical mobile and mobile earth terminal uses, High Data Rate terminal applications and propagation phenomena and compensation. NASA and others supporting fixed satellite use of the band argue the ACTS system has the potential of producing significant long-term public benefits. These include preserving U.S. leadership in satellite technology and creating export opportunities, developing commercial applications that will permit innovative use that will stimulate demand and economic growth, and providing important services to underserved geographic areas. Specific applications include ISDN networks, supercomputer access, and rural electric power monitoring and operations.

16. *Hughes application.* Hughes Communications Galaxy, Inc. (Hughes) has requested authority to construct, launch and operate a two-satellite domestic fixed-communications satellite system, which it calls "Spaceway", to provide services in the Ka-band. Spaceway would use 1000 MHz (29.0 - 30.0 GHz). This spectrum presently is being used by ACTS. Hughes anticipates its system would follow the ACTS program, and would be located at approximately the same orbital position. Hughes indicates that the service would provide "new, innovative and affordable satellite services across the United States to a wide range of commercial and residential users. . . . The Spaceway system will be, in essence, a telecommunications superhighway in the sky. It will provide a wide range of video, audio and data services . . . . [I]t will complement, and provide an alternative to, many existing terrestrial services. The terrestrial telecommunications network is evolving to meet end user requirements for 'bandwidth-on-demand.' The Spaceway system will continue this evolution as it will be the first domestic communications satellite system to provide 'bandwidth-on-demand' capabilities.""[6] Specific applications Hughes envisions include video telephony, high speed access to computer on-line services, interactive access to multimedia services, telecommuting and medical imaging services.[7]

b. MSS proposals

17. *Feeder links.* In 1991, the Commission initiated a proceeding to accommodate the establishment of a new non-geostationary satellite (low earth orbit or LEO) and/or geostationary satellite mobile-satellite service (MSS) in the bands 1610 - 1626.5 and 2483.5 - 2500 MHz (1.6/2.4 GHz bands).[8] A total of six applications were filed, five proposing LEO satellite systems[9] and one, filed by AMSC Subsidiary Corporation (AMSC), proposing to add additional frequencies to two authorized geostationary satellite orbit (GSO) MSS satellites.

18. An MSS system is comprised of three principal elements: the mobile subscriber transceivers which are used by end users, the satellite(s) with which those units interconnect, and the gateway earth stations which manage the network and interconnect with other networks. The system provides mobile terminal-to-satellite communications using mobile satellite service bands and satellite-to-gateway earth station (feeder link) communications using the fixed satellite service (FSS) bands. The satellite serves as a spaceborne repeater relaying communications between subscriber terminals and the gateway earth stations. The gateway earth station, in turn, processes the information being relayed by the satellite and interconnects the processed communications with other terrestrial networks (*e.g.*, the public switched telephone network) or with other subscriber units. Without the feeder links, an MSS system would be useless.

19. The six 1.6/2.4 GHz MSS applicants requested a variety of feeder link frequencies and bandwidths. Constellation, Ellipsat, and Loral each requested 66 MHz of feeder link spectrum in each transmission direction in the 5150 - 5216 / 6425 - 6725 MHz (5/6 GHz) bands. Motorola Satellite and TRW each requested 100 MHz in each transmission direction in the 19.4 - 20.2 / 29.1 - 30.0 GHz (20/30 GHz) bands, and AMSC requested an as yet undetermined amount of spectrum in the Ku-band (12/14 GHz).

20. In 1992 we established the "MSS Above 1 GHz Negotiated Rulemaking Committee" (NRMC) to obtain expert advice and recommendations on technical and operational matters related to MSS in the 1.6/2.4 GHz bands.[10] The NRMC analyzed the feeder link requirements and the Committee Report noted that the Federal Aviation Administration (FAA), a member of the committee, opposed the use of the 5 GHz frequencies for MSS feeder link use. The FAA is in the process of developing and implementing new navigation aids within the National Air Space System in this band. These include Differential Global Positioning System (DGPS), Terminal Doppler Weather Radar (TDWR) and Automatic Dependent Surveillance (ADS) of aircraft.)[11] Accordingly, although we are continuing to pursue 5 GHz for MSS feeder link operations in inter-agency forums, the 5/6 GHz band is not now readily available for the feeder link requirements for MSS Above 1 GHz systems. Further, the prospect of finding suitable LEO feeder link frequencies below 15 GHz is not encouraging because most of the available FSS allocations are encumbered by existing domestic and international services or by other

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[6] Hughes Application, filed December 3, 1993, at 1-2.
[7] *Id.* p. 6.
[8] Public Notice, Report No. DS-1068, 6 FCC Rcd 2083 (1991).
[9] The five applicants are Ellipsat Corporation (Ellipsat), Motorola Satellite Communications, Inc. (Motorola Satellite), Constellation Communications, Inc. (Constellation), Loral/Qualcomm Satellite Service, Inc. (Loral), and TRW, Inc. (TRW).
[10] Public Notice, Report No. DS-1265, 7 FCC Rcd 8614 (1992).
[11] NRMC Report at 30.)

service limitations.[12] We tentatively conclude that if we are to proceed with licensing 1.6/2.4 GHz MSS systems, adequate feeder link spectrum must be identified and available.

21. The NRMC report evaluated the Motorola and TRW requests for uplink feeder links in the 20/30 GHz band. The NRMC Report noted that the requested uplink frequencies overlap frequencies being used or proposed for use by other services. The NRMC Report concluded, based on information in the Suite 12 Petition for Rulemaking, that the LMDS transmissions would cause unacceptable interference into LEO/MSS satellite receivers and that if feeder link earth stations were to be protected, LMDS would be unable to be implemented in major metropolitan areas. The NRMC Report concluded that LMDS should be excluded from the 28 GHz band.[13]

22. Since the 5 GHz band and other frequency bands below 15 GHz are not now available for LEO feeder link use, it appears that the most likely alternative at the present time is the 20/30 GHz band. In a Notice of Proposed Rulemaking adopted today, CC Docket x 92-166, FCC 94-11, we state that we expect to be able to identify sufficient spectrum within the 27.5 - 30.0 GHz band to satisfy uplink feeder link requirements of all MSS Above 1 GHz licensees.[14] Accordingly, by this action we are proposing that applicants' feeder link operations be included in the negotiated rulemaking process proposed herein.[15]

B. Shared Use of the 28 GHz Band

23. As an initial matter, it must be noted that the proposals before us are largely that. There is little evidence in the record regarding the likely public interest benefits of the various proposals, including increased access to high-quality, affordable and innovative services, and stimulation of economic growth through increased competition for existing services and introduction of new services that may be expected to stimulate demand and create jobs. Among the satellite proposals, NASA's ACTS program is in operation, but there is no recent information regarding its performance. Thus, the record does not indicate which of NASA's experiments have demonstrated commercial feasibility, or when an evidentiary base from which to predict the benefits of its experiments is likely to be realized.

24. Among terrestrial proposals, we have granted one permanent and 12 experimental licenses to entities interested in developing service in the 28 GHz band.[16] Only CVNY is operating in the band pursuant to regular license. We gave CVNY a license pursuant to waiver of our current rules governing the 28 GHz band so that it would be able to offer its point-to-multipoint video distribution service in the New York PMSA. At last report, however, CVNY is serving only about 200 subscribers. We have no data on whether LMDS is capable of providing viable competition to franchised cable television systems, nor whether it can provide service over a large geographic territory. No party is offering commercial two-way telecommunications service. The claims of LMDS developers for terrestrial service provision in the 28 GHz band remain unproven.

25. Only three experimental licensees have filed progress reports to date. None of the reports provides us with any information upon which to evaluate the success of their experiments. RioVision had not yet received equipment to begin experiments when it filed a status report in December, 1992. CVNY's and Video/Phone's progress reports briefly describe the areas in which they are conducting experiments.

26. Although there is little data from which to predict what would be the best licensing choice, our preference is to accommodate all potential users of the 28 GHz band, both terrestrial and satellite. This outcome would be in keeping with our responsibilities under Sections 1 and 7 of the Communications Act and would provide consumers with the maximum number of service choices to meet their needs.

27. Section 1 mandates that we "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges. . .". 47 U.S.C. 151. Congress also requires us, through Section 7, 47 U.S.C. 157(a), to "encourage the provision of new technologies and services to the public." So important is this policy, Congress has enjoined that "[a]ny person or party (other than the Commission) who opposes a new technology or service ... shall have the burden to demonstrate that such proposal is inconsistent with the public interest." It has been our experience, in the

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[12] For example, footnote US245 to the Table of Frequency Allocations, 47 C.F.R. Part 2, limits the use of certain fixed satellite service frequency bands to international systems subject to a case-by-case electromagnetic compatibility analysis.

[13] NRMC Report at 32.

[14] Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610 -1626.5 / 2483.5 - 2500 MHz Frequency Bands, Notice of Proposed Rulemaking, CC Docket 92-166, -- FCC Rcd --- (1994), FCC 94-11, adopted January 19, 1994, paragraph 76. The precise amount of spectrum will depend upon the number and capacity of systems that ultimately are licensed.

[15] Hughes's Reply Comments suggested that LMDS should be allocated the 37 - 38.6 GHz band, which presently is allocated to private mobile services and point-to-point services. In comments filed November 3, 1993, "Licensee's Statement of Compliance and Request for Extension of Milestone Dates," File Nos. 54-DSS-P/L-90, 55-DSS-P-90, Norris argues that LMDS can successfully use higher frequencies in the 36 GHz and higher range. The Coalition to Preserve the Primary Status of the 27.5 - 29.5 GHz Band for Satellite Services (Satellite Coalition) argued in an *ex parte* communication that LMDS should be assigned the 40.5 - 42.5 GHz band. These arguments are unsupported. Unlike the 28 GHz band, no LMDS equipment manufacturer has suggested the use of this spectrum for LMDS, nor have we received any petition for rulemaking requesting redesignation of this frequency band by a prospective LMDS provider. See "LMDS Is Not Viable in the 40.5 - 42.5 GHz Band," *ex parte* presentation by Suite 12 on December 16, 1993. Accordingly, unless recommended otherwise by a consensus of a negotiated rulemaking committee, we will not grant further consideration to Hughes's and Norris's suggestion since there is no evidence in the record that the beneficial uses we anticipate from point-to-multipoint use of the 28 GHz band are likely to materialize at the higher bands.

[16] The experimental licenses allow the licensee to use the entire two gigahertz of spectrum in the 28 GHz band. Suite 12 holds one experimental license in Beverly Hills, and CVNY holds an experimental license in addition to its permanent license for the 27.5 - 28.5 GHz band in New York City. M3 of Illinois holds three licenses in Chicago, Elgin and Waukegan. RioVision holds a license in Brownsville as does the University of Texas - Pan American. Video Phone holds four experimental licenses in San Jose, Sunnyvale, Washington D.C. and Miami. In addition, NYNEX is authorized to use 27.5 GHz in White Plains.

nearly sixty years since the Communications Act was enacted, that accommodating new technology and service proposals serves these objectives. In our view, making the 28 GHz band available to all potential service providers would allow consumers to determine the best use of this spectrum. Accommodating all proposals would, we believe, result in the availability of maximum communications services possible at the lowest consumer prices possible.

28. Comments are mixed on the issue of whether LMDS and satellite services can coexist. The LMDS manufacturers Suite 12, Video/Phone, and GEC are emphatic that coprimary sharing is possible with feasible technical adjustments by both types of users. Satellite operators are equally emphatic that sharing is not possible. For example, NASA has provided a technical analysis critiquing Suite 12's system. NASA's analysis concludes that the system would cause and receive unacceptable interference to and from satellite links for a distance of 60 kilometers from LMDS hub transmitters. Suite 12 has responded *ex parte* with an analysis showing that NASA's assumptions are inaccurate and that the interference level generated would be below NASA's required sharing criteria. RioVision argues that NASA's analysis of the 28 GHz band shows characteristics virtually identical to 20 GHz propagation characteristics, and questions whether NASA's data came from experience at the higher frequency range. GEC states that the interference into the Iridium LEO satellite from LMDS transmitters would be negligible, and that sharing would be possible. Video/Phone proposes that sharing between Motorola's Iridium feeder links and 28 GHz point-to-multipoint applications is possible if feeder links are 60 miles from LMDS hub transmitters.

29. Comsearch states that the key element for any sharing is the realistic interference objectives and that it is necessary to have studies to determine the interference criteria, system compatibility and frequency coordination procedures. Comsearch proposes that the Commission work closely with industry experts to resolve disagreements in developing this information and to expedite the rulemaking process. Video/Phone recommends a Negotiated Rulemaking process for any technical issues that need to be resolved, including those raised by FSS system proponents.

30. The coordination issues involved in allowing all interested parties to use the 28 GHz band are highly technical, and their solutions depend upon the specific system design of various proposals to use the 28 GHz band. Moreover, these system designs and the supporting technologies are still in the developmental stage and the course of their development could be influenced by our decisions in this proceeding. We believe that the best way to resolve the issues discussed here would be to establish an advisory committee to negotiate proposed regulations to govern this band.[17]

31. The negotiated rulemaking process is appropriate where:

(a) there is a need for the rules to be developed;

(b) there is a limited number of identifiable interests that will be significantly affected by the rules;

(c) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (1) can adequately represent the identifiable interests and (2) are willing to negotiate in good faith to reach a consensus on the proposed rules;

(d) there is a reasonable likelihood that a committee will reach a consensus on the proposed rules within a fixed period of time;

(e) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of final rules;

(f) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee, and

(g) the agency will, to the maximum extent possible consistent with the legal obligations of the agency, use the consensus of the committee with respect to the proposed rules as the basis for the rules proposed by the agency for notice and comment. Negotiated Rulemaking Act Sec. 3, 5 U.S.C. 583(a).

32. This proceeding meets the determination criteria summarized above. Technical rules are necessary to establish under what circumstances, if any, sharing between satellite and terrestrial uses is feasible. The parties whose interests are affected are identifiable from comments filed in this proceeding. These interests can be adequately represented on a committee, and we believe that they will act in good faith to reach a consensus on technical rules within a set time frame. We believe that the negotiated rulemaking process will better use public and private resources than would our requiring more iterations of written comments until an adequate record is developed. We have adequate resources to commit to this endeavor and would use the consensus or report of the committee to develop proposed technical rules.

33. Thus, our initial determination indicates that the criteria for a negotiated rulemaking process are met in this situation. We request comment in response to the public notice, released concurrently with this action, which invites interested parties' comments on our proposal to use the Negotiated Rulemaking process. We believe this is the best way to accommodate all proposed uses of the band.

C. Choices for the 28 GHz Band

34. In spite of parties' best efforts, sharing may not be possible for all proposed uses. The technology required to permit sharing may not yet be developed, sharing efforts may result in unacceptable degradation of service to consumers, or sharing techniques may be prohibitively expensive, thus making an otherwise competitive service unaffordable to customers. In fact, at present it appears that sharing may not be possible under all circumstances proposed by the various parties interested in the 28 GHz band. For example, Hughes's proposal would place ubiquitous transceivers at subscriber locations in a manner similar to

[17] Pursuant to 5 U.S.C. 581, a public notice is being issued concurrently with this action requesting comments on the establishment of an advisory committee to negotiate proposed regulations.

that proposed by Suite 12; under certain circumstances, MSS feeder link and FSS operations may interfere with and receive interference from LMDS operations. In addition, Calling Communications indicates that its yet-to-be filed application will be for services that cannot share spectrum with other satellite services nor with terrestrial services.[18]

35. The prospect that only some of the proposed services can be accommodated within the 28 GHz band leaves this Commission with the duty to choose which non-shareable services should be licensed. In order to make these choices, we require a record based on issues pertaining to the overall public interest in enabling only certain of the non-shareable services. Options for choosing among services include, but are not limited to, enforcing a particular modulation scheme for some or all users; segmenting the band to include as many services as possible with less spectrum than parties requested; assigning all spectrum to satellite uses; or assigning all spectrum to terrestrial uses.

1. Enforcing a prescribed modulation scheme.

36. If sharing between satellite services and present LMDS proposals is not feasible, our proposal for two 1000 MHz LMDS frequency blocks is not feasible unless we preclude satellite use. However, even if sharing is not feasible, it may be possible to accommodate equivalent LMDS uses in less than 2000 MHz if digital, instead of the proposed analog, technology is used. Our spectrum management obligations require that we maximize the public interest benefits that can be derived from the efficient use of the spectrum. A number of commenters recommend that we require digital technology, either directly by rule, or effectively by reducing the bandwidth of frequency blocks so that service providers must use digital technology. For example, Motorola suggests that future technological developments include additional alternative modulation technologies to allow broadband services in a fixed cellular reuse pattern within 250 MHz of bandwidth, so that the services described in the NPRM could be offered on a total of 500 MHz of spectrum by using a 4-cell reuse pattern on two 250 MHz bands, each split into separate cells by alternating vertical and horizontal polarization. Norris states that 1000 MHz of spectrum would support up to 664 high quality digital television channels, and argues that LMDS should be confined to half the proposed allocation.[19] Video/Phone and GEC indicate that they are developing digital technology for services in the 28 GHz band.

37. Suite 12 and others, including individuals and small businesses, support the initial proposal. They argue *inter alia* that the Commission has erred in the past when it established new services, such as Multichannel Multipoint Distribution Service (MMDS) and Digital Electronic Message Service (DEMS), but failed to provide spectrum sufficient for licensees to offer a competitive service. They argue that the minimum competitive number of channels for wireless cable is fifty, and that this number of channels will require a full 1000 MHz of spectrum per licensee. Even the parties developing digital LMDS, Video/Phone and GEC, agree that a 1000 MHz allocation per licensee is necessary to accommodate Suite 12's analog technology.

38. In general, our licensing rules tend to favor techniques that permit licensees to use smaller increments of bandwidth to fulfill their service requirements because this enables us to accommodate more service providers and to facilitate competition among them. Competition tends to encourage efficient operation by licensees, and to produce lower prices, which in turn may stimulate demand for more services and may encourage the development of innovative, new services, maximizing the economic potential of the spectrum. With regard to LMDS, the same bandwidth can accommodate a greater number of video or telecommunications channels if a licensee uses a combination of digital modulation and compression rather than analog technology. If digital technology is feasible in the 28 GHz band, it would appear that our regulatory objectives of maximum utilization and spectrum efficiency could be better served by allotting smaller frequency blocks for licensing. Moreover, if sharing with satellite entities is not feasible, smaller LMDS blocks may be a necessity.

39. We note that there is a trend in other radio communications systems toward the use of digital modulation techniques. Experience in other frequency bands has shown that where feasible, these modulation schemes are more spectrally efficient, less susceptible to interference, and offer greater system reliability. Field tests are underway to determine whether digital compression technologies can increase the efficiency of digital radio transmission systems. So far, tests have demonstrated that through digital compression, as many as 15 video programming channels may be possible on a single 6 MHz channel.[20] However, with this level of compression, some picture degradation occurs as an object's motion increases. Whether digital systems are economically feasible, or practical in LMDS field environments, is unproven. Nor is it clear when such systems would be available to provide service. On the other hand, digital systems would appear to facilitate interconnection with other digital networks and the overall development of digital products and services. This would seem to maximize the potential for economic growth.

40. In addition to addressing whether digital modulation techniques should be prescribed for LMDS, we also ask whether a particular modulation scheme should be prescribed for other users as well. For example, should all users of the band employ a code division modulation system? Would that enhance the potential for maximizing sharing opportunities in the band? What would be the costs and benefits of such an approach?

2. Segmenting the band.

41. Accommodating current and proposed satellite needs for the 28 GHz band may require 800 MHz (*e.g.*, 28.7 - 29.5 GHz) of the total 2000 MHz proposed to be redesignated, assuming that accommodating satellite requirements precludes LMDS licensing in the same portion of the band, and further assuming that sharing between FSS and MSS feeder links is not feasible.

[18] Because Calling has not filed an application to construct, launch and operate a satellite system, we are unable to evaluate whether, or how, its proposal could be accommodated.

[19] Apparently, Norris's statement is based on a digital modulation scheme that produces at least 4 bits/sec/Hz or 6 MB/s per program channel for the level of signal quality noted.

[20] Decathlon Communications, *ex parte* presentation, September 20, 1993.

42. At present, it appears that there must be some separation in frequency or distance between LMDS and satellite service stations as currently proposed. The amount of these respective separations depends on interference objectives of both the LMDS and the FSS systems. The FSS may not be able to use the frequency bands effectively because LMDS systems are omnidirectional and because we intend that LMDS service be widely available.[21] The FSS gateways proposed for LEO applications will require multiple moving antennas at an earth station site, sweeping the sky, following multiple LEO satellites simultaneously. Thus, coordination with a ubiquitous terrestrial system such as LMDS could be difficult, if not impossible, in some locations.[22]

43. Finally, if band segmentation is necessary, we ask what an appropriate segmentation would be. For example, should the upper 800 MHz of the band (28.7 - 29.5 GHz) be reserved for satellite uses? Can MSS feeder link uses share with other fixed satellite uses? Can fixed satellite uses share with each other? What are the public interest and economic consequences of these choices?

3. Assigning all spectrum to satellite use.

44. This option would make the entire 28 GHz band available to satellite use only. The benefits of this option would be that satellite services would, as NASA requests, have additional spectrum for expansion as the Ku and C bands become saturated. The comments of the satellite parties provide a description of the new services and capabilities that are possible for satellite services in this band. The drawbacks of this option are that the proposed satellite services will not be available for some years, so availability of new services to consumers and any economic benefits to the Nation remain in the future. Moreover, satellite uses do not reuse frequencies as effectively as do terrestrial uses, so there may be fewer consumer applications possible than there would be if terrestrial uses also could be offered. Another drawback is, of course, that the terrestrial uses, which appear to be technologically feasible in the 28 GHz band now, either may never become available or may be considerably delayed while another block of spectrum is found and new technologies developed.

4. Assigning all spectrum to terrestrial use.

45. This option would make the entire 28 GHz band available to terrestrial use. The benefit of this option is that terrestrial service providers appear technologically capable of offering video service now, and may be capable of providing, with little delay, a wide variety of telecommunications services, including video telecommunications, distance learning, and broadband-on-demand. The potential for frequency reuse, and hence the ultimate number of service providers and customers who could be served, appears higher than that for satellite applications due to the probable use of cellular configuration and relatively small cells. Among the drawbacks of this option are that growth of the satellite industry may be significantly hindered, thus possibly injuring U.S. competitiveness in the world and harming an industry in which the U.S. is a world leader. In addition, NASA's ACTS program may be significantly constrained, and implementing a MSS service will be much more difficult.

5. Standards for determining which options will be used.

46. In order for us to promulgate final rules on use of the 28 GHz band, and to determine, if necessary, which services can and should be accommodated, we must have additional information. To that end, we are proposing a Negotiated Rulemaking Procedure so that proposed service providers may participate in making this information available. Specifically, we intend to ask the Committee to address the following issue:

> What technical rules should be adopted for the Local Multipoint Distribution Service and/or the fixed satellite service so as to maximize the sharing of the spectrum among these services?

If the Negotiated Rulemaking Committee is able to accommodate all proposed uses of the band, we ask that it propose specific rules to effectuate a sharing plan. We ask that it provide an analysis of how benefits of its proposed solution outweigh other options for accommodating these services. Specifically, we ask that it explain:

- the proper definition of the product market and geographic market for the services proposed;
- the degree of competition anticipated within the relevant market (including the extent to which the proposed services are expected to compete with existing services);
- the degree to which new services and technological innovations will be stimulated by the proposed allocation;
- the amount and nature of investment in the national telecommunications infrastructure expected as a result of the use of the band for the particular services(s);
- the kind and number of jobs that would be created as a result of the licensing of particular services;
- any other available data concerning the economic growth expected to result from the allocation for the particular service(s).

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[21] Some satellite entities have expressed their concern that their use of the downlink at 17.7 - 20.2 GHz band will be foreclosed if they have no corresponding uplink spectrum available in the companion 27.5 - 30 GHz band. We realize that without spot beam antennas or other advanced technology to allow better frequency reuse for downlink channels, satellite entities will be limited to the same amount of spectrum for downlinks in the 17.7 -20.2 GHz band as they have spectrum for uplinks in the 27.5 - 30 GHz band because uplink and downlink channels are paired. This is a further reason for satellite entities to assist in the development of sharing techniques and criteria; if the 28 GHz band is available for uplinks, then more of the 17.7 - 18.9 GHz band may also be used for downlinks, thus expanding the satellite entities' spectrum capacity.

[22] Pursuant to Hughes's December 3, 1993, proposal, user stations would be ubiquitous because Hughes proposes to install earth stations at residential and business customer premises. The fact that both LMDS and FSS proponents wish to provide transmitting equipment at subscriber premises, and that the LMDS receivers will also be located at subscriber locations, compounds the sharing difficulties and would appear to require site-by-site frequency coordination for both services.

47. In the event the Negotiated Rulemaking is unsuccessful in reaching a consensus regarding proposed technical rules that would accommodate the proposals before us, we require a record to enable us to select the best choices among services proposed. Assuming the Commission ultimately must select among service proposals for the 28 GHz band, the factors we will employ to do this will include:

(a) Economic growth potential: Which solution holds the greatest potential for stimulating lower prices and higher demand for services, and in what product markets and geographic markets? Which solution offers competition in existing markets, and which markets? Which solution best promotes increased efficiencies in spectrum usage, and permits the greatest number of service providers to operate commercially viable systems? Which solution best promotes the offering of new, high-quality and innovative services? Which solution promises to create the greatest number of high-paying jobs, and how? Which solution offers the greatest potential for maximizing interconnection of U.S. telecommunications services and facilities?

(b) Other public interest concerns that may not be readily calculable in economic terms: Which proposed plan appears most likely to make the most services, or the most valuable services, available to the broadest segment of the national community? What are the services, and to whom would they be available? Do any of the proposals promise needed services for unserved or underserved areas, and if so, what services, and to which communities would they be made available? Are particular services more likely to be valuable for educational, job training and employment applications, health care, environmental or public safety uses? Do any of the proposals serve our goal of facilitating the development of a National Information Infrastructure, and if so, how?

(c) Timing: When are the services likely to become available, and when are the benefits they promise likely to materialize? If different benefits are likely to be realized at different times, what are the relative advantages of the short-term and long-term benefits of the various services proposed? For example, should we license a service that is likely to become available in one to two years, but outlive its usefulness in five to eight years, if doing so would preclude licensing a service that is likely to produce tangible benefits only after five years, but which benefits may be expected to have long-lasting impact on economic growth and other public interest concerns? What are the likely opportunity costs of not licensing the particular service for operation in this band? Are there any contingencies that would affect the likely offering of the proposed services in a timely manner, such as market entry barriers[23]

48. The proposed standards require quantification on the record in order for us to make decisions based on these factors. To that end, we request that commenters provide us with specific, detailed information that would permit us to base a decision on the public interest impact of various options. In particular, we require precise data on the exact nature of services proposed to be offered by each applicant, what entities would provide the services, the business plans of the service providers, and the expected primary and secondary benefits of the proposed services.

E. Summary and Conclusion

49. Pursuant to the Negotiated Rulemaking Act, we hereby propose to begin the process to decide whether we should implement a Negotiated Rulemaking Proceeding to allow interested parties to reach a consensus on methods to share the 28 GHz band. Accordingly, we are issuing today a public notice seeking comment on the establishment of a Negotiated Rulemaking Proceeding on this issue. If the comments support the establishment of such a proceeding, and if the General Services Administration gives its approval, a Negotiated Rulemaking Committee will be formed to consider the issues raised in this Notice, and specifically the questions raised in paragraph 46. Consistent with the Negotiated Rulemaking Act, in the event the Committee reaches a consensus on all or some of the matters before it, we will publish the Committee's report. A Third Notice of Proposed Rulemaking will also be issued requesting comment on the Committee's recommendations. If the Committee is not established or is established but is unable to reach any consensus, we will issue a public notice to establish a pleading cycle for comments and replies on the issues raised in this Notice.

IV. PROCEDURAL MATTERS

A. *Ex Parte* Rules - Non-restricted Proceeding

50. This Second Notice of Proposed Rulemaking proceeding is a non-restricted notice and comment proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. 1.1202, 1.1203, and 1.1206(a).

B. Initial Regulatory Flexibility Analysis

51. *Reason for action.* The purpose of this Second NPRM is to obtain comment on the proposed changes in fixed terrestrial and satellite service usage for the 28 GHz frequency band.

52. *Objectives.* The objective of this proposal is to consider methods for appropriating spectrum in the 28 GHz band among existing and potential service proponents.

53. *Legal basis.* The authority for this action is the Administrative Procedure Act, 5 U.S.C. 553; and Sections 4(i), 4(j), 301, 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. 145, 301, and 303(r).

54. *Reporting, recordkeeping and other compliance requirements.* None.

55. *Federal rules which overlap, duplicate or conflict with these rules.* None.

[23] The relative efficiency of spectrum use and reuse capability among service providers may also be a factor entering into any final decision.

56. *Description, potential impact and number of small entities involved.* Since the first NPRM was issued, we have been made aware of numerous small entities interested in manufacturing and/or providing customer services using a variety of new technologies being developed in the 28 GHz band. The proposals contemplated herein, to the extent they limit the previously proposed rule changes, could impact these small businesses. The impact on small entities described in the NPRM released January 8, 1993, applies to this action as well.

57. *Significant alternatives.* Since the first NPRM was issued, we have been made aware of other firms researching the potential for new technology for video and other telecommunications services in the 28 GHz band. In addition, satellite entities may offer alternatives to some services that would be offered in this band. In part due to these alternatives, we are taking the instant action.

C. Comment Dates

58. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments at a time to be established by public notice if the Commission does not establish a Committee or if a Committee is established but does not reach any consensus.[24] To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, of the Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

59. For further information, contact Ms. Susan Magnotti, at (202) 634-1773, Domestic Facilities Division, Common Carrier Bureau.

V. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED That the Second Notice of Proposed Rulemaking is hereby adopted:

61. IT IS FURTHER ORDERED That a Public Notice pursuant to the Negotiated Rulemaking Act, 5 U.S.C. Sec. 581, SHALL BE ISSUED in accordance with the findings herein;

62. IT IS FURTHER ORDERED That the Secretary shall mail a copy of this document to the Chief Counsel for Advocacy, Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[24] As noted previously, if any Committee consensus is reached, a Third Notice of Proposed Rulemaking will be issued. See para. 49, *supra*.

APPENDIX

Parties filing comments:

Acor, Everett T., Jr.

Alex. Brown & Sons, Inc.

Alpha Industries, Inc.

Amby, Faith C.

America's Public Television Stations, Public Broadcasting Service, Organization of State Broadcasting Executives and Southern Educational Communications Association

Ameritech

Anchorage Telephone Utility

Baderwood International, Inc.

Bell Atlantic Personal Communications, Inc. on behalf of the Bell Atlantic Companies, The New Jersey Bell Company, The Bell Telephone Company of Pennsylvania, The Diamond State Telephone Company, The Chesapeake and Potomac Telephone Companies, and Bell Atlantic Enterprises International, Inc.

BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Enterprises, Inc.

Box Springs Educators

Calling Communications Corporation

Cardiff Broadcasting Company

Caribbean Communications Corp. d/b/a St. Thomas-St. John Cable TV

Carney, Joseph D. & Associates

Catel Telecommunications

Cellular Television Associates, Inc.

Coalition for Wireless Cable

Cole, Raywid & Braverman

Competitive Cable Association

Cyrus Partnership

Dataflow Systems

Digital Microwave Corporation

Eagle Engineering & Communications Group, Inc.

Educational Parties (filing jointly): American Council on Education, Board on Distance Education and Telecommunications of the National Association of State Universities and Land Grant Colleges, Instructional Telecommunications Consortium of the American Association of Community Colleges, Western Cooperative for Educational Telecommunications, Arizona Board of Regents for Benefit of the University of Arizona, California State University, Alliance for Higher Education, Iowa Public Broadcasting Board, University of Maine at Augusta, University of Washington, University of Wisconsin

System, Washington State University, South Carolina Educational Television Commission and Ana G. Mendez Educational Foundation

EMI Communications Corporation

Foresight Communications

GHz Equipment Company

Gilio, Robin V.

GTE Service Corporation

Guy, Frederick R.

Haddon, Perry W.

Hornby, Harold

Hughes Space and Communications Co. and Hughes Network Systems, Inc.

Joplin Beepers, Inc.

King Broadcasting Associates

Kingswood Associates

Linz, Robert M., P.E.

Levin, Michael H.

Loral Qualcomm Satellite Services, Inc.

M3 Illinois Telecommunications Corp.

M/A-COM, Inc.

Metrocom Telecasting

Mettler Communications, Inc.

Milani, Patricia B.

Motorola

Motorola Satellite Communications, Inc.

Multi-Micro, Inc.

National Aeronautics and Space Administration

National Association for the Advancement of Colored People

National Captioning Institute, Inc.

New York Department of Public Service

Norris Satellite Communications

NYNEX Mobile Communications Company

Pacific Telesis Group, Pacific Bell and Nevada Bell

RioVision of Texas, Inc.

Rochester Telephone Corporation

Rock Hill Telephone Company, Fort Mill Telephone Company and Lancaster Telephone Company

RSW Communications, Ltd.

Rumore, Victor

Seiter, Steven P.

Senvista General Partnership

Sprint Corporation on behalf of Sprint Communications Company L.P. and the United and Centel Telephone companies: Carolina Telephone and Telegraph Co., United Telephone - Southeast, Inc., United Telephone Company of the Carolinas, United Telephone Co. Southcentral Kansas, United Telephone Company of Eastern Kansas, United Telephone Company of Minnesota, United Telephone Company of Missouri, United Telephone Company of Texas, Inc., United Telephone Company of the West, United Telephone Company of Florida, The United Telephone Company of Pennsylvania, United Telephone Company of New Jersey, Inc., United Telephone Company of the Northwest, United Telephone Company of Ohio, United Telephone Company of Indiana, Inc., Central Telephone Company, Central Telephone Company of Florida, Central Telephone Company of Illinois, Central Telephone Company of Virginia, and Central Telephone Company of Texas

Stephenson, Todd

Subscriber TV Partners

Suite 12 Group

Technology Engineering Company

Telephone and Data Systems, Inc.

Total TV, Inc.

United States Interactive and Microwave Television Association United States Telephone Association

University of California

University of Colorado

University of Texas System

U S WEST, Inc.

Utilities Telecommunications Council

Video/Multipoint, Inc.

Video/Phone Systems, Inc.

Virginia Communications, Inc.

Western Sierra Bancorp

Wireless Cable Association International, Inc.

Wireless Cable, Ltd.

Parties filing reply comments:

Anchorage Telephone Company

Bell Atlantic Personal Communications Co.

Calling Communications Corporation

Coalition for Wireless Cable

Cole, Raywid & Braverman

Comcast Corporation, Jones Intercable, Inc., and Cablevision Industries Corporation

Digital Microwave Corporation

Eagle Engineering

Gigahertz Equipment Company

GTE Service Corporation

Hughes Space and Communications Company

Leaco Rural Telephone Company

M3 Illinois Telecommunications

Motorola, Inc.

Motorola Satellite Company

National Aeronautics and Space Administration

National Association of Regulatory Utility Commissioners (NARUC)

National Council of LaRaza

New York Department of Public Service

Public Broadcasting Service
RioVision of Texas, Inc.
Rumore, Victor
Sprint Corporation
Suite 12 Group
Telephone & Data Systems, Inc.
Thomas & Associates
Video/Phone Systems, Inc.
U.S. Telephone Association
Wireless Cable Association

Parties making *ex parte* communications:

American Institute of Aeronautics and Astronautics
Bell Atlantic
Bridgewater State College
Bridgewater Television Research & Development Committee
Town of Bridgewater, Massachusetts
Honorable Lloyd M. Bentsen
Honorable John Bryant
Calling Communications
Coalition to Preserve the Primary Status of the 27.5 - 29.5 GHz Band for Satellite Services
Decathlon Communications, Inc.
Department of Agriculture, Office of the Secretary
Endgate Technology Corporation
Honorable E. (Kika) de la Garza
Hughes Space and Communications Company
Motorola Satellite Communications, Inc.
MSS Above 1 GHz Negotiating Committee
National Aeronautics and Space Administration
National Telecommunications and Information Administration
Norris Satellite Communications, Inc.
Office of Science and Technology Policy, Executive Office of the President
Plymouth County Selectmen's Association
Suite 12 Group
Video/Phone Systems, Inc.

Separate Statement

of

Commissioner Andrew C. Barrett

Re: Local Multipoint Distribution Services; Second Notice

I support this action to institute a Negotiated Rulemaking to determine the feasibility of resolving technical sharing and allocation issues raised by LMDS, Ka band satellite, and LEO proponents seeking feeder links in the 28 Ghz band. However, I must register my concern that this process is not used to unnecessarily delay the introduction of new services or technologies in the near term. In this regard, I am particularly sensitive to the Commission's treatment of small business proponents who seek to provide new technologies or services to the public. We have instituted a pioneer preference process to attempt to rectify some of the inequities of presenting new proposals to the Commission. Further, our statutory directive with respect to auctions allows the Commission to be sensitive to the participation of small business in various spectrum-based service allocations.

The Negotiated Rulemaking process is a mechanism for the Commission to resolve technical issues that it otherwise does not have sufficient expertise to resolve on its own. To date, it has been used to resolve technical issues between proponents of a particular service that we have authorized, such as Low Earth Orbit satellite services. However, until now, this process has not been used to resolve potential technical issues between different service allocation proposals which have not yet been authorized. Thus, in this context, I am concerned that the Negotiated Rulemaking process is not used as a de facto barrier that prevents small businesses from pursuing innovative service allocations in a timely manner. If I perceive that the Negotiated Rulemaking process is used as a means of unduly delaying the market entry of viable, innovative services, particularly those proposed by small businesses, I will not hesitate to withdraw my support for this process, either in this docket, or in future dockets where the process is considered. Thus, I believe it is in the interest of all parties to this proceeding to resolve their technical issues expeditiously.

It is my hope that other interested parties such as rural interests, small business groups, state PUCs, municipalities, minorities, and women would take this opportunity to comment on the relative public interest merits of the different services proposed for this 28 Ghz band; particularly in terms of new ownership opportunities, jobs, market competition and economic development. Perhaps some of these interests should register their concerns during this Negotiated Rulemaking process. We must monitor the evolution of this process very closely to ensure it does not unduly delay new services from small businesses.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PanAmSat, L.P. File No. CSS-94-003
577-DSE-AL-94

and

PanAmSat Licensee Corp.

Application for Consent to *pro forma* Assignment of International Space Station Licenses and Domestic and International Earth Station Licenses

ERRATUM

Released: March 9, 1994

On February 8, 1994, a *Memorandum Opinion and Order* (*Order*) was released, DA 94-109, granting the applications of PanAmSat, L.P. and PanAmSat Licensee Corp. captioned above. Paragraph 6 of the *Order* should read as follows:

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.116 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 18, 1994

REGIONAL BELL OPERATING COMPANIES FILES PETITION FOR WAIVER TO ACCOUNT FOR 800 SERVICE MANAGEMENT SYSTEM SERVICES

PUBLIC COMMENT INVITED

On February 9, 1994, the Regional Bell Operating Companies (RBOCs) filed a petition for waiver of Section 32.14, Regulated accounts, of the Commission's rules requesting that the revenues and costs associated with their 800 Service Management System (800 SMS) tariff be recorded only on the books of Database Services Management, Inc. (DSMI), a wholly owned subsidiary of Bellcore. The RBOCs believe that this approach is appropriate because of the unique circumstances surrounding the provision of 800 SMS service.

800 SMS services are provided on a centralized basis for the entire country by Bellcore and other companies on behalf of the RBOCs. The RBOCs formed DSMI as in order to administer the tariff for these services. Since DSMI handles all aspects of providing these services, the RBOCs believe that DSMI's books are the only place where total revenues and costs associated with these tariffed services would be recorded.

Parties may file comments on the RBOC's petition for waiver no later than April 18, 1994. Replies should be filed by May 3, 1994. Comments should reference AAD 94-31. A copy of each pleading should be sent to Debbie Weber, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Debbie Weber at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 11, 1994

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Brewer, Brooks D. - Request for refund of a hearing fee for a broadcast station at Elk City, Oklahoma - **Granted** (February 2, 1994).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

9 FEB 1994

Dan J. Alpert, Esq.
1250 Connecticut Avenue, N.W.
7th Floor
Washington, D.C. 20036-2603

Re: Brooks D. Brewer
Broadcast Applicant at Elk City, Oklahoma
File No. BPH-921027MD
Fee Control # 9302198170416001

Dear Mr. Alpert:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.1111. The subsection checked below is specifically applicable to your request.

____ No fee is required for the above referenced submission (§1.1111(a)(1)).

____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

____ The applicant cannot fulfil the prescribed age requirement (§1.1111(a)(3)).

____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(6)).

____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(3)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

SECOND REPORT AND ORDER

Adopted: February 3, 1994; **Released:** March 7, 1994

By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. This Report and Order revises our rules to implement Sections 3(n) and 332 of the Communications Act of 1934 (the Act), as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (Budget Act).[1] The Budget Act was signed into law on August 10, 1993. On September 23, 1993, we adopted a Notice of Proposed Rule Making in this proceeding,[2] in which we sought comment on: (1) definitional issues raised by the Budget Act; (2) which existing mobile services and future mobile services should be classified as "commercial mobile radio services" (CMRS) under the statute and which should be classified as "private mobile radio services" (PMRS); and (3) which provisions of Title II of the Communications Act should not be applied to commercial mobile radio services. We have received 76 comments and 52 reply comments in response to the *Notice* in this proceeding.[3]

2. The Order reflects the Commission's efforts to implement the congressional intent of creating regulatory symmetry among similar mobile services. First, we interpret the statutory elements that define commercial mobile and private mobile radio service. Second, using these definitions, we determine the regulatory status of existing mobile services and of personal communications services (PCS). Third, for those services that will be classified as CMRS, we address the degree to which such services will be subject to regulation under Title II of the Act. We also address other issues raised in the *Notice*, including interconnection rights, and preemption of state regulatory authority over mobile service providers.[4] Additional issues raised by the Budget Act, such as revisions to our technical rules needed to implement the regulatory scheme discussed herein, will be addressed in a Further Notice of Proposed Rule Making to be issued shortly, and, consistent with the Budget Act, will be resolved by August 10, 1994.[5] We also anticipate that we will initiate several other proceedings to address related issues.[6]

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[1] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

[2] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Notice of Proposed Rule Making, 8 FCC Rcd 7988 (1993) (*Notice*).

[3] For a list of parties filing comments and reply comments, see Appendix D.

[4] In an earlier action in this docket we established filing procedures for foreign ownership waivers pursuant to the Budget Act. Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, First Report and Order, FCC 94-2 (released Jan. 5, 1994)(*First Report and Order*). See para. 12 and note 536, *infra*. We are aware that the treatment of alien ownership of CMRS and other common carrier services is of concern to many parties. We intend to examine this issue in a future proceeding.

[5] Budget Act, § 6002(d)(3).

[6] *See* Part IV.C, para. 285, *infra*.

II. BACKGROUND

A. Legislative and Commission Actions Prior to Budget Act

1. *Regulatory Classification of Mobile Services*

3. The Commission has a long history of regulating mobile radio services for the purpose of encouraging the growth of the mobile services industry so that consumers will have greater options for meeting their communications needs. The Commission has traditionally classified land mobile radio services[7] into two categories: private land mobile services and public mobile services.[8] Public mobile services are subject to common carrier regulation under Title II of the Communications Act, which, among other things, requires common carriers to provide service upon reasonable request[9] and prohibits unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services.[10] Common carriers are generally subject to state regulation of intrastate services if a state chooses to regulate those services.[11] In addition, Section 310(b) of the Communications Act limits alien ownership of common carrier radio licensees.

4. Private land mobile services, on the other hand, developed to provide service tailored to the needs of particular user groups, such as local governments, public safety organizations, and businesses requiring specialized services that common carriers could not readily provide. Most early private radio services were established to enable specific user groups to build their own systems for internal use. As the demand for private service grew, however, the Commission also authorized licensees in some services to offer "private carrier" service, *i.e.*, service to limited groups of third-party users on a for-profit basis.[12] In either case, private radio was not subject to common carrier regulation at either the state or the federal level.

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[7] Other categories of mobile services include marine and aviation services, mobile satellite services, and certain personal radio services. These categories are addressed in our discussion of the definition of "mobile service" under Section 3(n) of the Act. See Part III.B.1, paras. 30-38, *infra*.

[8] Traditionally, the most common type of public mobile service was radio telephone service which interconnected with existing telephone systems. Private services were predominantly dispatch services such as those operated by police departments, fire departments, and taxicab companies, for their own purposes. Private services also extended to services provided to eligible users by third party providers. *See* National Ass'n of Reg. Util. Comm'ners v. FCC, 525 F.2d 630, 634 (D.C. Cir. 1976) (*NARUC I*).

[9] Communications Act, § 201, 47 U.S.C. § 201.

[10] *Id.*, § 202, 47 U.S.C. § 202.

[11] The Commission may preempt State regulations when interstate and intrastate services are inseparable and state regulations would thwart or impede federal policies. *See* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986) (*Louisiana PSC*); Maryland Pub. Serv. Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. Co. v. FCC, 883 F.2d 104 (D.C. Cir. 1989)(*NARUC II*); National Ass'n of Reg. Util. Comm'ners v. FCC, 880 F.2d 422 (D.C. Cir. 1989); Public Util. Comm'n of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989)(*Texas PUC*); North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir.)(*NCUC I*), *cert. denied*, 434 U.S. 874 (1977); North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir.)(*NCUC II*), *cert. denied*, 429 U.S. 1027 (1976).

[12] *See* Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, Docket No. 18262, Second Report and Order, 46 FCC 2d 752 (1974), *recon.*, 51 FCC 2d 945 (1975), *aff'd*, *NARUC I*.

5. In 1982, Congress amended the Communications Act by adding Section 3(gg) and Section 332(c). The purposes of adding these provisions were: (1) to define private land mobile service; (2) to distinguish between private and common carrier land mobile services; and (3) to specify the appropriate authorities empowered to regulate these same services.[13] Section 3(gg) defined private land mobile service as "a mobile service . . . for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation."[14] In addition, Section 332(c)(3) preempted state authority to impose rate or entry regulation upon any private land mobile service.

6. The Commission interpreted Section 332(c)(1) of the Act as confirming that the commercial sale of interconnected telephone service was a common carrier offering, but also concluded that the statute allowed private land mobile services to interconnect with the public switched telephone network and retain their regulatory status so long as the licensee did not profit from the provision of interconnection.[15] In a parallel development, the Commission concluded that Section 332 allowed it to extend the range of eligible users for Specialized Mobile Radio (SMR) and Private Carrier Paging (PCP) services, enabling licensees in these services to offer service to a broad customer base with only minimal restrictions.[16]

7. The Commission's decisions, however, also created the prospect of direct competition between private land mobile services and similar common carrier services under disparate regulatory regimes. In 1991, for example, we authorized Fleet Call, Inc. (now Nextel Corp.) to develop an SMR system that Fleet Call claimed would offer wide-area, digital voice and data service comparable or superior to cellular in quality.[17] Similarly, the liberalization of the Commission's PCP rules made it difficult for consumers to distinguish private paging from common carrier paging. Because of the greater degree of regulation imposed on common carriers (federal and state regulation) than on private carriers, common carriers argued that continuing to treat wide-area SMRs and PCPs as private carriers placed competing common carrier services at a regulatory disadvantage. In 1992, this debate was given new urgency by the Commission's proposal to allocate spectrum to PCS.[18] In its PCS proposal, the Commission left open the

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[13] H.R. Rep. No. 97-765, 97th Cong., 2d Sess., at 54 (1982).

[14] Communications Act, § 3(gg), 47 U.S.C. § 153(gg)(Budget Act, § 6002(b)(2)(B)(ii)(II), struck this provision).

[15] *See* Interconnection of Private Land Mobile Systems with the Public Switched Telephone Network in the Bands 806-821 and 851-866 MHz, Docket No. 20846, Memorandum Opinion and Order, 93 FCC 2d 1111 (1983).

[16] *See* Amendment of Part 90, Subparts M and S of the Commission's Rules, PR Docket No. 86-404, Report and Order, 3 FCC Rcd 1838 (1988), *clarified,* 4 FCC Rcd 356 (1989); Amendment of the Commission's Rules To Permit Private Carrier Paging Licensees To Provide Service to Individuals, PR Docket No. 93-38, Report and Order, 8 FCC Rcd 4822 (1993)(*Private Paging Order*).

[17] *See* Fleet Call, Inc., Memorandum Opinion and Order, 6 FCC Rcd 1533, *recon. dismissed,* 6 FCC Rcd 6989 (1991) (*Fleet Call*). Although Fleet Call requested waiver of several sections of the Commission's Rules to construct its wide-area SMR system, we determined that it was necessary to waive only Section 90.631, which requires that trunked systems must be constructed within a one-year period. We granted a waiver of this section and provided Fleet Call five years to construct any stations that would be part of its digital networks. 6 FCC Rcd at 1535.

[18] Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, ET Docket No. 92-100, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676 (1992) (*PCS Notice*).

question of whether PCS would be treated as a common carrier service, a private carrier service, or a combination of both.[19] The concern that a new generation of mobile services could be subject to inconsistent regulation caused many to argue that the existing regulatory regime should be revised.

2. *Competitive Carrier Decisions*

8. In its *Competitive Carrier* docket, the Commission classified common carriers with market power, such as the local exchange carriers (LECs) and American Telephone and Telegraph Company (AT&T), as dominant and thereby subject to full Title II regulation; carriers without market power were classified as non-dominant. Because non-dominant carriers lacked market power to control prices and were presumptively unlikely to discriminate unreasonably, the Commission adopted for them a policy of forbearance from certain regulations.[20] These carriers were not required to file tariffs under Section 203 of the Act and were not subject to certain other Commission regulations adopted pursuant to the authority of other Title II provisions. Non-dominant carriers did, however, remain subject to the general common carrier obligations of Sections 201 and 202 of the Act, and to the enforcement of these obligations pursuant to complaint procedures under Section 208.

9. Title II has been applied to paging and cellular services in somewhat different manners. The Commission has declared domestic public land mobile carriers, which are primarily providing paging services, to be non-dominant in their provision of interstate services.[21] Cellular service was designated as dominant by the Commission although without any analysis of the market power of cellular carriers.[22]

10. Last year, however, the United States Court of Appeals for the District of Columbia Circuit found the Commission's forbearance policy of permissive detariffing to be inconsistent

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[19] *Id.* at 5712-14 (paras. 94-98).

[20] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252 (*Competitive Carrier*), Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); First Report and Order, 85 FCC 2d 1 (1980) (*First Report*); Further Notice of Proposed Rule Making, 84 FCC 2d 445 (1981) (*Further Notice*); Second Further Notice of Proposed Rule Making, FCC No. 82-187, 47 Fed Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (*Second Report*), *recon.*, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rule Making, 48 Fed Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Fourth Report*), *vacated*, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, Jan. 21, 1993; Fourth Further Notice of Proposed Rule Making, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Fifth Report*), *recon.*, 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Sixth Report*), *rev'd*, MCI Telecomm. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[21] *See* Preemption of State Entry Regulation in the Public Land Mobile Service, CC Docket No. 85-89, Report and Order, FCC 86-112, 59 Rad.Reg. (P&F) 1518 (1986), *remanded on other grounds*, National Ass'n of Reg. Util. Comm'ners v. FCC, No. 86-1205 (D.C. Cir. Mar. 30, 1987), *clarified*, Preemption of State Entry Regulation in the Public Land Mobile Service, CC Docket No. 85-89, Memorandum Opinion and Order, 2 FCC Rcd 6434 (1987), *citing Competitive Carrier, First Report; Competitive Carrier, Fifth Report.*

[22] *Competitive Carrier, Fifth Report*, 98 FCC 2d at 1204 n.41. *See also Competitive Carrier, Fourth Report*, 95 FCC 2d at 582.

with Section 203 of the Act.[23] As a result of this decision, mobile common carriers began to file new tariffs for their interstate services.

B. Budget Act Revisions

11. It is against this background that Congress enacted Section 6002(b) of the Budget Act to revise Section 332 of the Communications Act. The amended statute changes the prior regulatory regime in two significant respects. First, Congress has replaced the common carrier and private radio definitions that evolved under the prior version of Section 332 with two newly defined categories of mobile services: commercial mobile radio service (CMRS) and private mobile radio service (PMRS). CMRS is defined as "any mobile service (as defined in section 3(n)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[24] PMRS means "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service."[25]

12. Second, Congress has replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and gives the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers. Section 332(c) states that a person providing commercial mobile radio service will be treated as a common carrier, but grants the Commission the authority to forbear from applying the provisions of Title II, except for Sections 201, 202, and 208. Sections 332(c)(1)(A) and 332(c)(1)(C) identify the criteria for forbearance. The statute also preempt state regulation of entry and rates for both CMRS and PMRS providers. States, however, may petition the Commission for authority to regulate CMRS rates under some circumstances.[26] In addition, the Budget Act "grandfathers" the foreign ownership, as of May 24, 1993, of current private land mobile service providers that we reclassify as CMRS so that such providers are not required to divest their foreign ownership interests if they file a waiver request in a timely manner.[27] Finally, the statute requires the Commission to determine the regulatory status of PCS before February 6, 1994.[28]

III. DISCUSSION

A. Overview

1. *Congressional Objectives*

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[23] AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, Jan. 21, 1993, *cert. denied*, S. Ct. Docket No. 92-1684, 1993 Lexis 4392, 113 S. Ct. 3020, 61 U.S.L.W. 3853 (June 21, 1993). *See also* Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Notice of Proposed Rule Making, 7 FCC Rcd 804 (1992), Report and Order, 7 FCC Rcd 8072 (1992), *rev'd*, AT&T v. FCC, No. 92-1628 (D.C. Cir. June 4, 1993), *cert. granted*, 62 U.S.L.W. 3375 (Nov. 29, 1993).

[24] Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

[25] *Id.*, § 332(d)(2), 47 U.S.C. § 332(d)(2).

[26] *Id.*, § 332(c)(3), 47 U.S.C. § 332(c)(3).

[27] *See* note 4, *supra.*

[28] Communications Act, § 332(c)(1)(D), 47 U.S.C. § 332(c)(1)(D).

13. We believe Congress had two principal objectives in amending Section 332. First, Congress saw the need for a new approach to the classification of mobile services to ensure that similar services would be subject to consistent regulatory classification. The Conference Report explains that the intent of Congress is that, "consistent with the public interest, similar services are accorded similar regulatory treatment."[29] This objective was accomplished by replacing the common carrier and private carrier classifications that had evolved under the prior statute with the new categories of CMRS and PMRS. By establishing a new class of commercial mobile radio services, Congress has taken a comprehensive and definitive action to achieve regulatory symmetry in the classification of mobile services.

14. The other congressional objective reflected in the statute was to ensure that an appropriate level of regulation be established and administered for CMRS providers. While the statute ensures that all CMRS providers will be subject to certain key requirements of Title II, Congress has given the Commission authority to forbear from applying other Title II provisions if such regulation is not needed to prevent unreasonably discriminatory rates or practices, or to protect consumers, and if such forbearance is consistent with the public interest (*e.g.*, the Commission action, by augmenting competition, promotes better services for consumers at reasonable prices). By taking these steps, Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace.

15. The decisions we make in this Order thus are driven by these two congressional mandates. We believe the actions we take in this Order establish a symmetrical regulatory structure that will promote competition in the mobile services marketplace and will thus serve the interests of consumers while also benefiting the national economy. Moreover, in striving to adopt an appropriate level of regulation for CMRS providers, we establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers by this Order.

16. We have kept this objective in view in exercising the forbearance authority Congress included in the Budget Act. First, we forbear from imposing any tariff filing obligations upon CMRS providers. Second, we also forbear from establishing any market entry or market exit requirements under Section 214 of the Act. Third, although we have decided not to forbear with regard to certain other sections of Title II,[30] we also have decided not to invoke our authority under any of these provisions because we find no need to do so and we believe that the

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[29] H.R. Rep. 103-213, 103rd Cong., 1st Sess. 494 (1993) (Conference Report). *See also* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 259-60 (House Report). Although commenters may disagree about the extent to which specific mobile services are similar, they almost unanimously agree that Congress intended these provisions of the Budget Act to create a system of regulatory symmetry. *See, e.g.*, AAR Reply Comments at 2; AMTA Comments at 4-5; American Petroleum Comments at 4; Ameritech Comments at 1-2; Arch Comments at 4; Bell Atlantic Comments at 2 (the "principle of 'regulatory parity' should serve as the polestar for this rulemaking"); CTIA Comments at 3; DC PSC Comments at 3; E.F. Johnson Comments at 3-4; LCRA Comments at 4; McCaw Comments at 1-2; Mtel Comments at 2; Nextel Comments at 5; NYNEX Reply Comments at 2; Pactel Paging Reply Comments at 9; Sprint Reply Comments at 1-2; UTC Comments at 3; Vanguard Comments at 2.

[30] We retain our authority under Section 213 (valuation of carrier property), Section 215 (transactions relating to services and equipment), Section 218 (inquiries into management), Section 219 (annual and other reports), Section 220 (accounts, records, and memoranda), and Section 221 (special provisions relating to telephone companies).

imposition of requirements under these provisions[31] could cause unwarranted burdens for carriers classified as CMRS providers. Fourth, we have vigorously implemented the preemption provisions of the Budget Act to ensure that state rate regulation of CMRS providers will be established only in the case of demonstrated market conditions in which competitive forces are not adequately protecting the interests of CMRS subscribers. Finally, although we have chosen not to forbear from specific provisions of Title II that are designed to protect consumers,[32] we do not believe that private carriers reclassified as CMRS providers will face any significant burdens as a result of becoming subject to these provisions. For example, private carriers reclassified as CMRS providers would face potential costs under Section 226 only to the extent they elect to engage in the provision of operator services.

17. We believe, based on the record before us, that private carriers who now will be regulated as CMRS providers will not find themselves confronted by a new set of burdensome regulatory requirements that might impede their provision of service or place them at a competitive disadvantage in the mobile services marketplace.[33] In deciding whether to impose regulatory obligations on service providers under Title II, we must weigh the potential burdens of those obligations against the need to protect consumers and to guard against unreasonably discriminatory rates and practices. In making this comparative assessment, we consider it appropriate to seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy ultimately benefit from such a course. In that regard, for example, we intend to issue a Further Notice of Proposed Rule Making in this proceeding to examine whether we should adopt further forbearance measures under Title II of the Communications Act (in addition to those taken in this Order) in the case of specified classes of CMRS providers. We conclude that our forbearance actions in this Order strike the proper balance in carrying out the congressional mandate.

2. *Impact on National Economy*

18. Before turning to our discussion of the specific issues addressed in this rule making, we present here a general economic analysis of the actions taken in the Order. We review the potential effect of our actions on the creation of jobs and the overall health of the national economy, the likelihood that our decisions will help spur investment in the nation's telecommunications infrastructure, and the effectiveness of our actions in enabling all Americans to gain access to the nation's information superhighway.

a. Fostering Economic Growth

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[31] We will, however, consider in a Further Notice requiring cellular licensees to submit information concerning their operations. *See* para. 194, *infra.*

[32] We do not forbear from Section 223 (obscene or harassing telephone calls), Section 225 (telecommunications services for hearing-impaired and speech-impaired individuals), Section 226 (Telephone Operator Consumer Services Improvement Act), Section 227 (restrictions on use of telephone equipment), and Section 228 (regulation of carrier offering of pay-per-call services).

[33] We will, however, shortly be issuing a Further Notice of Proposed Rule Making to gather a more comprehensive record regarding the impact of our decisions on certain classes of entities, and to determine whether further forbearance under Title II may be warranted. It also is significant that existing private mobile radio licensees that were licensed prior to August 10, 1993, and are subject to reclassification are further protected by the three-year transition period established in the Budget Act. In addition, any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services is also protected by the Budget Act's three-year transition period. See Part IV.B, paras. 278-284, *infra.*

19. We believe our decisions in this Order will have a positive effect on job stimulation and economic growth because these decisions continue our efforts to foster competition in the mobile marketplace. This result will be achieved in the following ways. First, we interpret the elements of the commercial mobile radio service definition in a manner that ensures that competitors providing identical or similar services will participate in the marketplace under similar rules and regulations. Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs — and not by strategies in the regulatory arena. This even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth. We find support for our approach in the record of this proceeding.[34] To take one example, McCaw argues that:[35]

> Congress recognized that the implementation of original Section 332 had created a cockeyed marketplace in which enhanced specialized mobile radio licensees, but not their cellular competitors, were exempt from Title II of the Communications Act and from state regulation, and where radio common carriers were forced to compete against private carrier pagers that faced essentially no regulation at the Federal or state level. . . . It would thwart the intent of Congress . . . to define commercial mobile service in a manner that excluded *any* provider of interconnected service to the public or a substantial portion of the public. That term should be broadly construed, with exceptions only for services that cannot provide the functional equivalent of a commercial mobile service.

20. Second, competition will be enhanced by the interconnection policies we establish in this Order. By making clear that interconnection obligations currently imposed upon LECs with regard to current Part 22 providers will now apply to all CMRS providers, and that PMRS providers cannot be victimized by unreasonably discriminatory practices of LECs in their provision of interconnection, we ensure that competing mobile services providers all will have a fair opportunity to obtain access to the public switched network. These even-handed interconnection policies will promote competition, job creation, and economic growth.

21. Finally, this Order helps clear the way for the licensing of PCS. In expeditiously deciding regulatory classification issues applicable to PCS, we have taken a major step toward the establishment of PCS providers as participants in the mobile services marketplace. Although estimates vary, there is wide agreement that the development of PCS holds the promise of a significant increase in competition in mobile services and stimulation to the national economy.

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[34] *See* note 29, *supra*. Bell Atlantic, in an argument that is illustrative of the position taken by several parties, states that the Commission should:

> *Adopt a broad definition of "commercial mobile service" (CMS) and its related statutory terms, in order to assure that competing mobile services are classified as CMS and are treated alike.* . . . All services which in whole or in part are offered for profit to subscribers and that offer direct or indirect access to the public switched network should be considered CMS. Conversely, only a narrow group of genuinely private services would remain as private mobile services.

Bell Atlantic Comments at 2 (footnote omitted)(emphasis in original).

[35] McCaw Comments at 1-2 (footnote omitted)(emphasis in original).

b. Promoting Infrastructure Investment

22. The continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry. It thus is essential that our policies promote robust investment in mobile services. In this Order, we try to promote this goal by ensuring that regulation is perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communications services — rather than as a burden standing in the way of entrepreneurial opportunities — and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

23. First, in implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity.

24. Second, we have decided to forbear from the application of the most burdensome provisions of Title II common carriage regulation to CMRS providers. Consequentiy, investors will be able to make funding decisions based upon their assessment of market forces and their analysis of the strengths and weaknesses of the various telecommunications companies competing in the mobile services marketplace.

25. Third, we have engendered a stable and predictable federal regulatory environment, which is conducive to continued investment in the wireless infrastructure. Our definition of CMRS not only represents fidelity to congressional intent, but also establishes clear rules for the classification of mobile services, minimizing regulatory uncertainty and any consequent chilling of investment activity. An example of our objectives in this regard can be seen in the way we have approached the issue of functional equivalence. By refusing to tie the definition of functional equivalence to particular mobile service technologies, we have sought to avoid creating rules that cause mobile radio service providers to be reclassified because of technological changes in the way they deliver essentially the same services. This approach should result in the durability of our regulatory classifications, thus promoting the regulatory predictability that is an important prerequisite for investment.

c. Enabling Access to Information Superhighway

26. Our national economy is strengthened and the public interest is served to the extent we are successful in promoting and achieving the broadest possible access to wireless networks and services by all telecommunications users. The economy can be fortified by a ubiquitous communications web that extends access to a multiplicity of transmission capabilities to a wide community of business and residential users. Therefore, one of our objectives in this proceeding is the creation of a regulatory framework that makes access to the wireless infrastructure available to all Americans, at economically efficient prices.

27. We believe that this objective is served by our decision here. First, in heeding the congressional objective of establishing a broad class of CMRS providers, we have ensured that business customers and individual customers using mobile services are given the benefit of the core protections of Title II of the Communications Act. By classifying many mobile services as commercial, we have taken a strong step toward guaranteeing that all consumers will have non-

discriminatory access to these services. Commenters in this proceeding have recognized the advantages that our approach will have for consumers. CTIA, for example, points out that:[36]

> A broad definition of commercial mobile service, which includes services meeting the statutory definition and their functional equivalents, is necessary to prevent the threat of artificial disparities developing over time among similar services which are subject to differing regulatory regimes. Services falling within this broad classification include all current common carrier services (including cellular), all paging services, all specialized mobile radio ("SMR") services, and most PCS applications. Consistent regulatory treatment will foster the competitive process and, concomitantly, the consumer.

We believe that mobile services will play an increasingly important role in the nation's telecommunications networks, and we believe that non-discriminatory access to mobile services will give all consumers the opportunity to realize the expanding benefits of wireless technologies. For example, mobile technologies are extending the range of telecommunications services available in areas where the provision of conventional wireline services is not economically feasible. This capability is illustrated by the fact that cellular and paging carriers are increasingly serving the communications needs of businesses and residents in rural areas; in many cases these needs had not been adequately met because of the prohibitive costs associated with furnishing conventional wireline service. We believe that this opportunity will translate into consumer demand for a wide variety of mobile services, and that this demand will generate economic growth. Specifically, economic growth will be stimulated by the fact that business operations will be made more efficient and business productivity will be increased as a result of improved business access to the public switched network.

28. Second, although no one can predict with certainty the course that the development of PCS will take, we believe that the family of personal communications services holds the potential of revolutionizing the way in which Americans communicate with each other. In this Order, we establish the regulatory framework for the development of PCS principally as broadly available CMRS offerings.[37]

29. Third, in addition to playing a role in fostering competition, the decisions we make in this Order regarding interconnection obligations will promote access to the telecommunications infrastructure. Commercial mobile radio services, by definition, make use of the public switched network; the interconnection policies we establish in this Order ensure that providers of mobile services and their customers receive the benefit of the broadest possible access to the switched network.

B. Definitions

1. *Mobile Service*

a. Background and Pleadings

30. Section 332 of the Communications Act, as revised by the Budget Act, governs the regulation of all "mobile services" as defined in Section 3(n) of the Act. The *Notice* explained that the definition of "mobile service" under revised Section 3(n) is similar to the prior version

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[36] CTIA Comments at iii.

[37] We note, of course, that we also have established procedures under which carriers will have an opportunity to offer PCS on a private basis. *See* para. 119, *infra*.

of Section 3(n).[38] The Budget Act, however, amended the definition of "mobile services" under Section 3(n) to include (1) traditional private land mobile services, which were previously defined in Section 3(gg) of the Act (now deleted); and (2) personal communications services, whether licensed in our PCS docket[39] or in any future proceeding. We tentatively concluded that this revised definition was intended to bring all existing mobile services within the ambit of Section 332. Therefore, we proposed to include within the mobile services definition public mobile services (Part 22), mobile satellite services (Part 25), mobile marine and aviation services (Parts 80 and 87), private land mobile services (Part 90), personal radio services (Part 95), and all personal communications services licensed or otherwise made available under proposed Part 99.

31. The commenters generally agree with our tentative conclusion that the statute seeks to bring all existing mobile service within the ambit of Section 332. Thus, they agree with our proposal to include within this definition all services regulated under Parts 22, 25, 80, 87, 90, and 95.[40] While the parties generally agree that PCS and private land mobile services are to be included within the definition of mobile services, Bell Atlantic asserts that the Commission should define mobile services to include all auxiliary services and other mobile services provided by mobile services providers that are authorized by the respective rules of that service.[41] In this regard, MCI maintains that Section 3(n) of the Act should be interpreted broadly to recognize that PCS encompasses the full range of services described in the Commission's *Notice of Proposed Rule Making* in the PCS proceeding, including ancillary fixed services.[42]

32. Metricom argues that the statutory language in amended Section 3(n) demonstrates that Congress intended to include only licensed PCS services in the definition of mobile service. Thus, it maintains that unlicensed PCS is not a mobile service and therefore not commercial mobile radio service. Likewise, it argues that Part 15 devices are not licensed mobile services and therefore not commercial mobile radio services. It contends that because the Commission has recognized that unlicensed PCS and Part 15 devices are generically identical, Part 15 devices should be treated in a manner similar to the treatment of unlicensed PCS.[43] USTA contends that unlicensed PCS devices fall within the mobile service definition because unlicensed PCS should be classified as either commercial or private mobile radio service based on how the service is offered.

33. Rockwell maintains that the definition of mobile services should be further clarified to ensure that communications facilities provided on a transportable platform that do not move when communications services are provided are not included within the term. It believes that

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[38] "Mobile service" continues to be defined as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves." This definition includes "both one-way and two-way radio communications services."

[39] *See* Amendment of the Commission's Rules To Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314, First Report and Order, 8 FCC Rcd 7162 (1993)(*Narrowband PCS Order*), *recon.*, FCC No. 94-30, released Mar. 4, 1994 (*Narrowband PCS Reconsideration Order*); Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700 (1993) (*Broadband PCS Order*), *recon. pending*.

[40] *See, e.g.*, AMTA Comments at 6-7; NYNEX Comments at 4.

[41] Bell Atlantic Comments at 3-4.

[42] MCI Comments at 3-4.

[43] Metricom Comments at 1-5.

"mobile satcom equipment packaged in a briefcase" and dual-use equipment, such as Inmarsat-M terminals, should be considered fixed communications, not mobile services.[44] In addition, New York points out that the Commission has previously determined in its decisions regarding Basic Exchange Telecommunications Radio Service (BETRS) that merely substituting a radio loop for a wire loop in the provision of basic telephone service does not constitute mobile service under Section 3(n) of the Communications Act.[45]

b. Discussion

34. We agree with the commenters that the purpose of the legislation is to include all existing mobile services within the ambit of Section 332. Thus, we agree with the commenters that all public mobile services,[46] private land mobile services, and mobile satellite services should be included within the definition. We also agree with the commenters that most marine and aviation services regulated under Parts 80 and 87 meet the statutory definition of "mobile service" to the extent that the licensees do not provide fixed point-to-point service.

35. In addition, we agree with the commenters that all of the services regulated under Part 95, except for Interactive Video and Data Service (IVDS), which is a fixed service, meet the definition of mobile service. Therefore, we adopt the approach that we proposed in the *Notice* and include the services, with the exceptions noted in this Section and in the rules we adopt by our action in this Order, governed by Parts 22, 25, 80, 87, 90, and 95 within the mobile services definition. In accordance with the statute, we will also treat all personal communications services governed by Part 24 as mobile services.

36. In view of the goal of achieving regulatory symmetry by including all existing mobile services within the ambit of Section 332, we agree with Bell Atlantic that all auxiliary services provided by mobile services licensees[47] should be included within the definition of mobile services. For the same reasons we agree with MCI that all ancillary fixed communications offered by PCS providers should fall within the definition of mobile service.[48] This is consistent with the approach we have already taken in the PCS rule making proceeding, and we conclude that giving this scope to the definition of mobile service will ensure that mobile services providers will have the flexibility necessary to meet growing consumer demand for a broad range of mobile services.

37. We agree with Metricom that unlicensed Part 15 devices and unlicensed PCS should not be included within the definition of mobile services. Specifically, the Budget Act defined "mobile service" to include "service for which a license is required in a personal communica-

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[44] Rockwell Comments at 1-2.

[45] New York Comments at 4 n.1.

[46] This finding does not apply to Rural Radio Service, including BETRS, which is a fixed service. *See* para. 38, *infra.*

[47] For example, the Commission's Rules allow cellular service licensees to provide auxiliary common carrier service. Section 22.930 of the Commission's Rules, 47 C.F.R. § 22.930.

[48] As adopted in *Broadband PCS Order*, the term "Personal Communications Services" is defined as "[r]adio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks." 8 FCC Rcd at 7713.

tions service . . . .''[49] We agree with Metricom that this language refers only to licensed services. In addition, we note that in the *Broadband PCS Order*, we allocated the 1890-1930 Mhz band for unlicensed PCS devices[50] and included these devices under Part 15. In so doing, we indicated that ''this unlicensed approach could be expected to foster the rapid introduction of new PCS technologies by permitting manufacturers to introduce new products without the delays associated with the licensing of a radio service.''[51] Thus, we reject USTA's suggestion that unlicensed PCS should be classified as a mobile service. Accordingly, unlicensed PCS and Part 15 devices will not be included under the definition of mobile services. Finally, we conclude that mobile resale service is included within the general category of mobile services as defined by Section 3(n) and for purposes of regulation under Section 332, since resale of mobile service can only exist if there is an underlying licensed service. There is no indication in the statute or the legislative history that resellers are not ''mobile service'' providers or exempt from the Section 332 regulatory classification, and we see no reason to establish such an exemption.[52]

38. We also agree with Rockwell that satellite services provided to or from a transportable platform that cannot move when the communications service is offered should not be included within the definition of mobile service. These fixed services are used to provide disaster relief, temporary communications for news reporters and expeditions, and temporary communications in remote areas and cannot be used in a mobile mode. Services provided through dual-use equipment, however, such as Inmarsat-M terminals which are capable of transmitting while the platform is moving, are included in the mobile services definition. We also agree with New York that the substitution of a radio loop for a wire loop in the provision of BETRS does not constitute mobile service for purposes of our definition. As the Commission noted in the BETRS proceeding,[53] this service was intended to be an extension of intrastate basic exchange telephone service. Thus, the radio loop merely takes the place of wire or cable, which in rural and geophysically rugged areas is often prohibitively expensive to install and maintain.

2. *Commercial Mobile Radio Service*

a. Service Provided for Profit

(1) *Background and Pleadings*

39. The first prong of the statutory definition of CMRS requires that the service must be one ''that is provided for profit.''[54] In the *Notice*, we asked commenters to address four basic issues: (1) whether Special Emergency Radio Services provided to public safety entities on a for-

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[49] Communications Act, § 3(n)(3), 47 U.S.C. § 153(n)(3), as added by Budget Act, § 6002(b)(2)(B)(ii)(I).

[50] Unlicensed PCS devices are defined in new Section 15.303(g) as ''intentional radiators operating in the frequency band 1890-1930 MHz that provide a wide array of mobile and ancillary fixed communication services to individuals and business.'' Section 15.303(g) of the Commission's Rules, 47 C.F.R. § 15.303(g).

[51] *Broadband PCS Order*, 8 FCC Rcd at 7734 (para. 79).

[52] *See* para. 260, *infra*, for a discussion of the classification of FM subcarriers.

[53] Basic Exchange Telecommunications Radio Service, Report and Order, 3 FCC Rcd 214, 217 (1988)(*BETRS Order*).

[54] Communications Act, § 332(d), 47 U.S.C. § 332(d).

profit private carriage basis should be treated as private mobile services; (2) whether a licensee that uses its service strictly for internal use should be deemed to be offering a not-for-profit service; (3) whether licensees that operate systems for internal uses but also make excess capacity available on a for-profit basis should be deemed to be providing for-profit service; and (4) whether shared-use and multiple licensing arrangements may sometimes be for-profit services.

40. Most commenters agree that the "for-profit" prong of the CMRS definition was broadly intended to distinguish licensees who provide for-profit service to customers from licensees who operate systems solely for their own internal use.[55] Commenters also echo the proposal in the *Notice* that, in determining whether a particular offering meets the statutory definition of "for profit," we must review the "service as a whole." Commenters also argue that under the "service as a whole" test, a service that meets the "for-profit" definition should be classified as for-profit even if the interconnected portion of the service is offered on a not-for-profit basis.[56] Many commenters and reply commenters favor treatment of public safety, governmental, and special emergency radio services as non-profit offerings.[57] Other commenters recommend that such licensees that offer for-profit services with their excess capacity be classified as for-profit CMRS offerings to that extent.[58]

41. Commenters express divergent views, however, on the issue of whether licensees who lease or otherwise make commercial use of excess capacity on an otherwise not-for-profit system should be considered providers of "for-profit" service. Some commenters maintain that any leasing of excess capacity should be treated as for-profit service,[59] at least to the extent of that activity, regardless of whether the licensee operates the system primarily for internal use.[60] For example, NARUC contends that sale of excess capacity converts an otherwise private internal-use licensee into a commercial mobile radio service licensee.[61] Other commenters contend that PMRS licensees whose primary operations are not-for-profit should have the flexibility to make commercial use of their excess capacity, subject to certain limitations, without being deemed "for-profit" service providers as a result.[62] UTC, for example, proposes that the Commission continue to allow non-commercial private radio licensees to lease excess

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[55] *See, e.g.*, AAR Comments at 3; Mtel Comments 5; NABER Comments at 7; Nextel Comments at 9 n.13; NYNEX Comments at 5-6; Pacific Comments at 3; PageNet Comments at 5; Rochester Comments at 3; US West Comments at 16; Vanguard Comments at 3.

[56] *See, e.g.*, Arch Comments at 4-5 n.11; DC PSC Comments at 4; GTE Comments at 5; NARUC Comments at 14; New York Comments at 4-5; Pacific Comments at 4; Southwestern Comments at 6.

[57] *See, e.g.*, APCO Comments at 2; NABER Comments at 7; Nextel Comments at 8; Pacific Comments at 3; Southwestern Comments at 5; Telocator Comments at 8; UTC Comments at 5; Vanguard Comments at 3; PA PUC Reply Comments at 5; Securicor Reply Comments at 4. We note that, since the filing of its comments in this proceeding, Telocator has changed its name to "Personal Communications Industry Association." *See, e.g.*, Inside Wireless, Feb. 2, 1994, at 10.

[58] *See, e.g.*, McCaw Comments at 15-16; TDS Comments at 3-4.

[59] *See, e.g.*, Bell Atlantic Comments at 7; DC PSC Comments at 4; GTE Comments at 5; Rochester Comments at 4-5; Sprint Comments at 5; TDS Comments at 5.

[60] *See, e.g.*, NYNEX Comments at 5-6; PageNet Comments at 5; Rockwell Comments at 2-3; Southwestern Comments at 6; Telocator Comments at 9; Vanguard Comments at 3.

[61] NARUC Comments at 15 n.5.

[62] *See, e.g.*, American Petroleum Reply Comments at 6-8.

capacity without being deemed to be a for-profit service, provided that at least 51 percent of the system is used for the licensee's internal requirements and that none of the leased capacity is used to meet the licensee's basic loading requirements.[63]

42. In relation to shared-use arrangements, many commenters assert that such arrangements should be designated as not-for-profit because shared-use systems are generally operated on a cost-shared basis by a limited user group and do not serve as a reasonable substitute for commercial mobile radio service.[64] Several other commenters and reply commenters assert that shared-use arrangements do meet the statutory definition of for-profit services on the grounds that they serve as a substitute for common carrier paging and cellular services, or are otherwise structured with the intent to receive compensation.[65] Commenters also disagree on the impact of using for-profit managers in a shared-use system. Some commenters contend that these are legitimate non-profit arrangements because the manager's fee is simply a cost shared among the systems' users,[66] while others conclude that such arrangements should be deemed for-profit to prevent managers from operating *de facto* for-profit systems that masquerade as non-profit operations.[67]

(2) *Discussion*

43. We conclude that the statutory phrase "for profit" should be interpreted to include any mobile service that is provided with the intent[68] of receiving compensation or monetary gain. We agree with commenters that this interpretation encompasses all common and private carrier services that our rules define as being offered to customers for hire.[69] We also agree with commenters that a for-profit service provider may not avoid this prong of the CMRS definition by contending that it is not reselling interconnection for profit, but merely "passing through" the interconnected portion of its service to customers on a not-for-profit basis, as was allowed under our interpretation of the prior version of Section 332. This conclusion is supported by the plain language of the statute, which defines CMRS as "any mobile service . . .

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[63] UTC Comments at 5.

[64] *See, e.g.*, American Petroleum Comments at 6-7; ARINC Comments at 4; ITA Comments at 5; Motorola Comments at 7; Nextel Comments at 9; Telocator Comments at 9; UTC Comments at 7-8.

[65] *See, e.g.*, Bell Atlantic Comments at 7; McCaw Comments at 16; Rochester Comments at 3-4; USTA Comments at 3-4; US West Comments at 15; Vanguard Comments at 4; ARINC Reply Comments at 3; McCaw Reply Comments at 19-20; USTA Reply Comments at 2.

[66] *See, e.g.*, Motorola Comments at 7; Nextel Comments at 9 n.14; UTC Comments at 7-8.

[67] *See, e.g.*, Bell Atlantic Comments at 7; California Comments at 4-5; NARUC Comments at 15; Rochester Comments at 3-4; *but see* American Petroleum Reply Comments at 7-8; Securicor Reply Comments at 4-5.

[68] We believe that Congress intended the meaning of the phrase "for profit" to comport with that which has become common usage in relation to other federal statutes interpreting the phrase to mean an intent to make a profit, rather than requiring the realization of profit in fact. *See* North Ridge Country Club v. Commissioner of Revenue, 877 F.2d 750, 756 (9th Cir. 1989).

[69] Under our current rules, private carrier services include Specialized Mobile Radio, Private Carrier Paging, and 220 MHz Commercial service. In addition, licensees in the Special Emergency Radio Service may provide service for hire to eligible third-party customers. Licensees in all other Part 90 services may provide for-profit service to eligible users and may also be licensed for internal, non-commercial systems.

that is provided for profit *and* makes interconnected service available'' to the public.[70] By separating the ''for-profit'' and ''interconnected service'' elements of the CMRS definition, Congress made clear that all licensees who provide mobile service to customers with the intent of receiving compensation are ''for-profit'' service providers, regardless of whether some element of the service is characterized as a pass-through for accounting or other purposes. In reaching this conclusion our action is consistent with the congressional intent of the new Section 332 to regulate similar mobile services under comparable requirements. We note, however, that deeming a service ''for-profit'' under our test does not make it CMRS unless it also meets the other elements of the CMRS definition or is the functional equivalent of a service that meets the definition of CMRS.

44. We also conclude that Congress intended the phrase ''for profit'' to exclude services where the licensee does not seek to receive compensation from operation of a mobile radio system. Under this test, public safety and governmental services, other than private carrier licensees in the Special Emergency Radio Service, are plainly not-for-profit.[71] Similarly, businesses and other private entities who operate mobile systems exclusively for internal use will also be treated as not-for-profit under this test. Part 90 of our Rules currently defines an ''internal system'' as a system in which ''all messages are transmitted between the fixed operating positions located on the premises controlled by the licensee and the associated mobile stations or other transmitting or receiving devices of the licensee.''[72] Such systems are typically operated by licensees who require highly customized mobile radio facilities for their personnel to use in the conduct of the licensee's underlying business. Because such licensees have found their direct operation and control of internal systems to be an advantageous way to meet their internal communications needs, and because internal systems do not create a need for regulation to protect consumers under Title II, we conclude that businesses should continue to have the option to construct and operate internal systems on a private basis. Therefore, where a system is used only to serve the licensee's internal communications requirements rather than offered with the intent of receiving compensation, we conclude that the licensee is not providing service ''for profit'' within the meaning of the statute.

(a) Excess Capacity Activities

45. One of the main issues that arises in applying the for-profit element of the CMRS test is how to treat services in which one portion of the service is offered on a for-profit excess capacity basis while the other portion is not-for-profit. We conclude that any licensee that employs spectrum for not-for-profit service, such as an internal operation, but also uses its

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[70] Communications Act, § 332(d), 47 U.S.C. § 332(d) (emphasis added). We note that the approach taken by Congress in the statutory language precludes us from exploring the question whether Title II regulation should apply in the case of any company utilizing mobile service spectrum in connection with any profit-making venture, regardless of whether the venture involves the provision of mobile services on a for-profit basis. For example, the provisions of Title II would not extend to the operations of a delivery service company using its own mobile network for vehicle communications. Section 332 specifies that Title II regulation extends *only* to those cases in which spectrum is used to provide *a mobile service* on a for-profit basis.

[71] *See* 47 C.F.R. Part 90, Subparts B and C. As discussed below, private carrier SERS licensees will also be classified as PMRS notwithstanding their for-profit status, because we have concluded that the Special Emergency Radio Service is not ''available to a substantial portion of the public'' within the meaning of the statute. Paras. 67, 82, *infra.*

[72] Section 90.7 of the Commission's Rules, 47 C.F.R. § 90.7. An internal system shall be construed to include the premises (and associated mobile stations and devices) of the licensee and any other corporate or other business entity that controls, or is controlled by, the licensee.

excess capacity to make available a service that is intended to receive compensation, will be deemed to be offering a "for-profit" service to the extent of such excess capacity activities. For example, if a PMRS licensee makes a for-profit service available with its excess capacity, it would be for-profit to the extent of such activity. Furthermore, if the for-profit portion of the service meets the other elements of the CMRS definition, or is the functional equivalent of services meeting the CMRS definition, it is CMRS to the extent of such service. We agree with those commenters who argue that this rule applies whenever CMRS service is offered as a "hybrid" service, whether it is offered on an excess capacity basis, or as an "ancillary" service.[73]

46. We conclude that this approach is preferable to the "principal use" approach supported by some commenters, which would allow non-commercial licensees to offer for-profit services with their excess capacity without effect to their not-for-profit status so long as the principal use of the license was not-for-profit internal use. For example, we disagree with UTC's proposal that PMRS licensees should be able to remain private even if they lease up to 49 percent of their "reserve capacity" to other parties. In our view, UTC's approach could defeat the Budget Act's goal of regulatory symmetry by causing similar for-profit services to be classified differently because one happens to be paired with a not-for-profit service, while the other is not. Articulating a definition of what constitutes the "principal use" of a frequency would also be difficult because the nature of a licensee's use may change over time. Finally, adopting a principal use test might invite licensees to circumvent the for-profit test by structuring their services to be "principally" not-for-profit where they nevertheless intended to offer a for-profit service to the public.[74]

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[73] We believe that Congress contemplated allowing hybrid CMRS-PMRS services. For example, the statute directs the Commission to treat as a common carrier any "person engaged in the provision of service that is a commercial mobile service . . . *insofar as such person is so engaged* . . . ." Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A) (emphasis added). *See also id.*, § 332(c)(2). The plain meaning of the phrase "insofar as such person is so engaged" in these provisions contemplates partial or hybrid CMRS offerings.

[74] Our decision not to adopt a "principal use" test here is limited to our interpretation of the "for-profit" prong of the CMRS definition. In the Notice in our competitive bidding proceeding we propose to apply a "principal use" test to implement the requirement in Section 309(j)(2)(A) of the Act that, in order to be "auctionable," a particular service must be one that involves the licensee's receiving "compensation from subscribers." Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rule Making, FCC 93-455, 8 FCC Rcd 7635, 7639-40 (paras. 30-33) (1993) (*Auction Notice*). Under the proposed "principal use" test, a service is defined as auctionable if its "principal use" is to receive "compensation from subscribers" even if a portion of the service is used for non-compensatory communications. We specifically stated in the *Auction Notice*, however, that:

> [t]he distinction between "private mobile service" and "Commercial Mobile Service" in [amended] Section 332 turns on several criteria that are not relevant to Section 309(j), *e.g.*, whether the service is interconnected to the public switched network and provided to a substantial portion of the public . . . . Thus, it appears that a service could be classified as a private mobile service for purposes of Section 332 but not be deemed "private" for purposes of Section 309(j).

Id., 8 FCC Rcd at 7638-39 (paras. 25-26). Therefore, our decision not to adopt a "principal use" test here has no effect on our proposals in the auction proceeding.

(b) Shared-Use Systems

47. While we regard any leasing of excess capacity as for-profit service, we conclude that licensees should be able to enter into shared-use arrangements on a not-for-profit basis and not be deemed CMRS, provided that they meet certain requirements. We believe that Congress recognized the benefits of allowing private radio users to enter into legitimate cost-sharing arrangements and did not intend such arrangements to be classified as "for-profit" service.[75] As commenters note, such arrangements are beneficial because they allow radio users to combine resources to meet compatible needs for specialized internal communications facilities. At the same time, it was not Congress's intent, nor is it ours, to allow licensees to enter into sham "not-for-profit" arrangements in an effort to disguise essentially for-profit activity. To ensure that only legitimate cost-sharing arrangements are treated as not-for-profit, we will continue to require that all parties to cost-sharing arrangements be identified and disclosed in the licensee's records, and that all cost-sharing arrangements be fully documented by a written agreement maintained as part of the licensee's records, as is currently required under Section 90.179 of our Rules.[76] Licensees who meet these requirements will be deemed to be not-for-profit and presumptively classified as PMRS. We believe these safeguards are sufficient to prevent PMRS licensees from providing *de facto* for-profit service in competition with CMRS providers.[77] If it is demonstrated that, notwithstanding these safeguards, a licensee is operating a shared system authorized for not-for-profit or cost-shared use to offer a for-profit service, it will be in violation of Section 90.179 of the Commission's Rules,[78] and subject to enforcement actions. Ultimately, the licensee could be reclassified as CMRS, assuming it meets the other prongs of the test.

48. Because we are imposing these limitations on licensees who wish to enter into cost-sharing arrangements on a not-for-profit or cooperative basis, we consider it unnecessary to take the further step, suggested by some commenters, of prohibiting use of third-party managers to assist in the operation of such systems. Multiple-licensed systems ("community repeaters") that use managers are typically small systems in which all system users are individually licensed. In our view, Congress's concern in adopting the "for-profit" test was whether a radio service is being provided to customers for profit, not whether small groups of licensed users seek the assistance of a manager to operate their shared system. As several commenters note, managers play a beneficial role in the operation of many not-for-profit systems and typically receive compensation for their services. From the licensee's point of view, however, the manager's fee is no different from other shared costs of operation, *e.g.*, purchase of equipment and site rental. We see no indication in the statute or the legislative history that Congress intended to restrict the types of costs that licensees could share, so long as the cost-sharing arrangement among the licensees is *bona fide*. To do so, in our view, could inadvertently inhibit the ability of legitimate private licensees to obtain required technical and operational assistance so as to operate more efficiently.

49. Although we conclude that the hiring of a manager by multiple licensees does not fall within the definition of "for-profit" service, we intend to monitor closely the use of multiple-licensing arrangements to ensure that unlicensed managers do not attempt to provide for-profit service as *de facto* licensees. Our rules clearly state that the ultimate responsibility for operation

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[75] The definition of "mobile service" in Section 3(n) refers to "private" communications systems that may be licensed on an "individual, *cooperative, or multiple* basis." 47 U.S.C. § 153(n)(2) (emphasis added).

[76] 47 C.F.R. § 90.179.

[77] In addition to these safeguards, a violation of our rules could result in the imposition of other sanctions, including license revocation and forfeitures.

[78] 47 C.F.R. § 90.179.

of the system resides with the licensee and cannot be assumed by an unlicensed third party. Thus, a not-for-profit system structured to give an unlicensed manager sufficient operational control to provide for-profit service to customers would be a violation of Section 310(d) of the Communications Act[79] and our rules, for which the system license could be revoked. In addition, as noted above,[80] our decision to allow private shared-use systems to contract with system managers does not preclude our determining, based on an appropriate showing, that the system is a *de facto* for-profit service, and subject to the appropriate enforcement actions. In addition, the licensee may be subject to reclassification because it will meet the definition of CMRS, assuming it meets the other prongs of the test, or because it is the functional equivalent of CMRS.

b. Interconnected Service

(1) *Background and Pleadings*

50. In order for a mobile service to be defined as a commercial mobile radio service, it must make interconnected service available. The statute defines interconnected service as "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B)."[81] The *Notice* requested comment on the significance of the phrase "interconnected service," rather than "interconnected," which was used in the original House version of the legislation. We suggested two alternative explanations for this distinction: (1) that in order for a particular service offering to be considered "interconnected service," the service must be offered on an interconnected basis at the end user level, *i.e.*, the service must provide an end user with the ability to directly control access[82] to the public switched network (PSN) for purposes of sending or receiving messages to or from points on the network; or (2) that Congress crafted the language in order to avoid including private line service within the definition of "interconnected service." The *Notice* also sought comment on how to define the terms "interconnected" and "public switched network." In regard to the definition of "public switched network," commenters were asked to discuss whether the Commission should limit this term to local exchange and interexchange common carrier switched networks, or whether we should interpret this element more expansively.

51. Commenters generally agree that Congress intended by use of the term "interconnected service" to distinguish between those communications systems that are physically interconnected with the network and those systems that are not only interconnected but that also make interconnected service available.[83] Therefore, many commenters stress that interconnected

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[79] 47 U.S.C. § 310(d).

[80] Para. 47, *supra.*

[81] Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

[82] In referencing the notion of direct end user control in the *Notice* we had in mind services in which the user is able to initiate direct, real time interaction with the network, as opposed to services (such as those using store-and-forward technologies) in which the user does not have such a capability.

[83] AAR Reply Comments at 4; Bell Atlantic Comments at 8; GTE Comments at 5; NYNEX Reply Comments at 7; Pagemart Reply Comments at 3; Radiofone Reply Comments at 3; Securicor Reply Comments at 5; TRW Comments at 20 n.41; USTA Comments at 4; UTC Comments at 8; *see also* Geotek Comments at 7-8 (arguing that this distinction allows the Commission to adopt a threshold for determining when the traffic of the interconnected portion of a service reaches sufficient levels to be classified as interconnected service); *but see* Motorola Comments at 7 (arguing that interconnected service should be defined as physical interconnection with the public switched network because it might be

service should not include a service that uses the facilities of the public switched network for internal transmitter control purposes.[84] Some commenters believe that an interconnected service must provide an end user with the ability to control directly access to the public switched network for purposes of sending or receiving messages to or from points on the network.[85] The majority of commenters, however, interpret interconnected service as a service that will merely allow the subscriber to send or receive messages over the public switched network.[86] Several parties emphasize that the Commission should look to the subscriber's perception of whether the subscriber can send or receive messages over the public switched network.[87] According to TDS, the example of private line type services does not appear to be a useful basis for defining interconnected service. TDS contends that existing and emerging combinations of subscriber controlled switching and terminal devices permit the subscriber to make a coordinated use of multiple networks. These increasingly prevalent arrangements mean that there is realistically no effective limit on the number of points where any particular subscriber communication might ultimately be sent or received.[88] UTC, on the other hand, notes that utilities and pipeline companies often employ dedicated private lines that use and allow access to only a portion of the public switched telephone network.[89]

52. Many commenters agree that the Commission should follow the precedent of the *International Satellite Systems*[90] decision for determining whether a mobile service is

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difficult to apply the distinction between those systems that are physically interconnected to the public switched network and those that also make interconnected service available).

[84] DC PSC Comments at 5; NABER Comments at 8; PageNet Comments at 9; PRSG Comments at 2; Roamer Comments at 7; Securicor Reply Comments at 5; Southwestern Comments at 7; TDS Comments at 6; UTC Comments at 9.

[85] AmP Reply Comments at 3; NYNEX Comments at 7; Pactel Comments at 9; Pagemart Reply Comments at 6; TDS Comments at 6; TRW Reply Comments at 17; UTC Reply Comments at 10.

[86] Bell Atlantic Comments at 8; CTIA Comments at 8-9; GTE Comments at 5-6; E.F. Johnson Comments at 6; McCaw Comments at 17; NABER Comments at 8; Pacific Comments at 6; PageNet Comments at 6; PA PUC Reply Comments at 6-7; Rochester Comments at 4; Sprint Comments at 5-6; Southwestern Comments at 6-7; Telocator Comments at 9-10; US West Comments at 16-17; USTA Comments at 4; Vanguard Comments at 5; *see also* AMTA Comments at 9 & n.5 (supporting this definition in the context of two-way services, but expressing no opinion on the interpretation of those terms in the context of one-way paging operations).

[87] Bell Atlantic Comments at 9; NYNEX Comments at 7; Roamer Comments at 6-7; Sprint Comments at 6; US West Comments at 16-17.

[88] TDS Comments at 6; *but see* Radiofone Reply Comments at 4-5 (arguing that private line service typically may be originated and terminated only within the subscribing company's buildings, even though those buildings may be located in different states).

[89] UTC Comments at 10.

[90] Establishment of Satellite Systems Providing International Communications, CC Docket No. 84-1299, Report and Order, 101 FCC 2d 1046 (1985) (*International Satellite Systems*), *recon.*, Memorandum Opinion and Order, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon.*, Memorandum Opinion and Order, 1 FCC Rcd 439 (1986). In *International Satellite Systems*, the Commission concluded that interconnecting through a data circuit terminating in a computer that can store and process the data and subsequently retransmit it over that network constitutes interconnection to a public switched messaging network. *Id.* at 1101.

interconnected with the public switched network.[91] Several parties caution that making distinctions based on technologies could encourage mobile service providers to design their systems to avoid commercial mobile radio service regulation.[92] Other commenters encourage the Commission to adopt an approach that interconnection requires real-time access to the public switched network.[93] Consequently, commenters disagree about the implications of the definition of interconnection for store and forward services.[94] Several commenters also mention that Congress specifically contemplated reclassifying private carrier paging to commercial mobile radio service regulation by "grandfathering" private carrier paging services under private regulation for three years.[95] The parties that responded to our question regarding whether a mobile provider offers interconnected service if it offers service that is interconnected through an intermediary that is interconnected to the public switched network, generally agree that this would constitute interconnected service.[96]

53. Many commenters believe that the Commission should continue to use its traditional definition of public switched telephone network to include only local exchange carriers and interexchange carrier switched networks.[97] Some parties argue that there is no indication that

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[91] Arch Comments at 8; MCI Comments at 6; Mtel Comments at 6; NARUC Comments at 16; PageNet Comments at 7-8; USTA Comments at 5; Vanguard Comments at 5. *But see* Pagemart Reply Comments at 4 (arguing that this precedent bears no relationship to Congress's goal in amending Section 332); TRW Reply Comments at 17 n.37.

[92] BellSouth Comments at 8; MCI Comments at 6; Mtel Comments at 7; US West Comments at 17-18.

[93] Grand Comments at 3-5; Pagemart Comments at 5; RMD Comments at 3-4; TRW Reply Comments at 17.

[94] Those parties who consider store and forward technology to constitute interconnection include: Arch Comments at 7-8; Bell Atlantic Comments at 9-10; CTIA Comments at 9; DC PSC Comments at 5; E.F. Johnson Comments at 6 & n.7; GTE Reply Comments at 2-3; McCaw Comments at 29-30; MCI Comments at 6; Mtel Comments at 6-7; NABER Comments at 9-10; NARUC Comments at 16-17; New York Comments at 6; PA PUC Reply Comments at 7; Pacific Comments at 6; Pactel Paging Comments at 6; PageNet Comments at 5; Radiofone Reply Comments at 4; Roamer Comments at 7; Rochester Comments at 4; Sprint Comments at 5-6; Southwestern Comments at 7; Telocator Comments at 10 n.11; US West Comments at 17; USTA Comments at 5; Vanguard Comments at 5-6. Those parties who consider store and forward technology not to constitute interconnected service include: AmP Reply Comments at 2-4; Grand Comments at 3-5; NYNEX Comments at 8 n.10; Pagemart Comments at 5; Rockwell Comments at 3; TDS Comments at 7-8.

[95] *See* Budget Act, § 6002(c)(2)(B). NARUC Comments at 17; Nextel Comments at 16; PageNet Comments at 12-13; US West Reply Comments at 4 n.12. *But see* Pagemart Reply Comments at 7-8.

[96] GTE Comments at 6; NARUC Comments at 16; NYNEX Comments at 8; PA PUC Reply Comments at 6-7; USTA Comments at 4; US West Comments at 17-18; Vanguard Comments at 5. *But see* Geotek Comments at 8 (contending that indirectly connected services should not be deemed to be providing an interconnected service); Roamer Comments at 7 (claiming that it depends whether the service is interconnected as an integral part of the service offering or for the licensee's own internal purposes).

[97] BellSouth Comments at 9-10; GTE Comments at 6; McCaw Comments at 17; Motorola Comments at 7-8; NABER Comments at 8; PageNet Comments at 10; Roamer Comments at 6; Southwestern Comments at 7 n.4; Telocator Comments at 10; TRW Comments at 20 n.41; UTC Comments at 10.

Congress intended to broaden the scope of the term "public switched network."[98] Others, however, urge the Commission to adopt a more forward looking definition that acknowledges that the future of telecommunications will encompass many service providers using various technologies to create a "network of networks."[99] New York, for example, suggests that the definition of public switched network should include all networks — regardless of technology — that are now or in the future will be associated with the provision of switched services to the general public.[100] Nextel proposes a definition that encompasses service that can reach any subscriber or equipment addressable through the North American Numbering Plan.[101]

(2) *Discussion*

54. We believe that by using the phrase "interconnected service," Congress intended that mobile services should be classified as commercial services if they make interconnected service broadly available through their use of the public switched network.[102] The purpose underlying the congressional approach, we conclude, is to ensure that a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering (if the other elements of the definition of commercial mobile radio service are also present, or if the service can be deemed the functional equivalent of CMRS). Neither the statute nor the legislative history uses the term "end user control." We believe that it would be infeasible for end users, in any literal sense, to control directly access to the public switched network for sending or receiving messages to or from points on the network. The comments explain that subscribers are concerned only with the ability to transmit and receive messages to and from the public switched network.

55. We believe that Congress used the phrase interconnected service to further the goal of creating regulatory symmetry for similar mobile services. Thus, even a mobile service that is not yet interconnected, but has requested interconnection, is considered an interconnected service.[103] If Congress was concerned about end user or subscriber control of access to the network, it would not have included in the definition of interconnected service those services awaiting Commission response to interconnection requests. Therefore, we believe it is reasonable to conclude that an interconnected service is any mobile service that is interconnected with the public switched network, or service for which a request for interconnection is pending, that allows subscribers to send or receive messages to or from anywhere on the public switched network.[104] In addition, we will consider a mobile service to be offering interconnected service

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[98] McCaw Comments at 17; BellSouth Comments at 9-10; Southwestern Comments at 7 n.4; Telocator Reply Comments at 5.

[99] Bell Atlantic Comments at 9 n.9; New York Comments at 6; Nextel Comments at 10-11; NYNEX Comments 8-9; PA PUC Reply Comments at 7-8; Pacific Comments at 5; Sprint Comments at 7.

[100] New York Comments at 6.

[101] Nextel Comments at 11 n.18; *see also* NYNEX Reply Comments at 8 n.16; Pacific Comments at 5.

[102] *See* Conference Report at 496 (explaining that the Senate Amendment, adopted by the Conferees, requires an interconnected service to be broadly available).

[103] Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

[104] In defining interconnected service in terms of transmissions to or from "anywhere" on the PSN, we note that it is necessary to qualify the scope of the term "anywhere"; if a service that provides general access to points on the PSN also restricts calling in certain limited ways (*e.g.*, calls attempted to

even if the service allows subscribers to send or receive messages to or from anywhere on the public switched network, but only during specified hours of the day. We adopt this position because we do not wish to provide any incentive for a mobile service provider to limit access to the public switched network as a means of avoiding regulation as a CMRS provider. We agree, however, with those commenters who argue that our interpretation of interconnected service should not include interconnection with the public switched network for a licensee's internal control purposes.

56. The statute requires us to define the terms ''interconnected'' and ''public switched network.'' The Commission has a long history of deciding issues regarding interconnection with the public switched network.[105] For example, concerning cellular service providers, the Commission has explained the term ''physical interconnection.''[106] Part 90 of our Rules uses similar language to define interconnection.[107] In the CMRS context, we define ''interconnected'' as a direct or indirect connection through automatic or manual means (either by wire, microwave, or other technologies) to permit the transmission of messages or signals between points in the public switched network and a commercial mobile radio service provider.

57. Although we adopt language similar to that used in Part 90 of our Rules, we intend for this language to encompass mobile service providers using store and forward technology.[108] This approach to interconnection with the public switched network is analogous to the one that we used in determining what restrictions should apply to international communications satellite systems separate from INTELSAT. In *International Satellite Systems*, the Commission addressed whether it should authorize international communications satellites that would compete with INTELSAT. An Executive Branch letter to the Commission stated that certain restrictions must be imposed on these competing international satellite systems prior to final authorization by the Commission. The Commission was directed to prohibit these separate satellite systems from

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be made by the subscriber to ''900'' telephone numbers are blocked), then it is our intention still to include such a service within the definition of ''interconnected service'' for purposes of our Part 20 rules.

[105] *E.g.*, Use of the Carterfone Device in Message Toll Telephone Service, Decision, 13 FCC 2d 420 (1968).

[106] The term ''physical interconnection'' refers to the facilities connection (by wire, microwave or other technologies) between the end office of a landline network and the mobile telephone switching office (MTSO of a cellular network or the hardware or software, located within a carrier's central office, which is necessary to provide interconnection.

Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2918 n.27 (1987) (*Interconnection Order*).

[107] Connection through automatic or manual means of private land mobile radio stations with the facilities of the public switched telephone network to permit the transmission of messages or signals between points in the wireline or radio network of a public telephone company and persons served by private land mobile radio stations.

47 C.F.R. § 90.7.

[108] We note that the Private Radio Bureau interpreted prior Section 332 of the Act to find that store and forward technology did not constitute interconnection. In light of the amendments to Section 332 contained in the Budget Act, as implemented in this Order, the Private Radio Bureau's prior policy is no longer applicable.

providing communications interconnected with public switched message networks.[109] In clarifying which services were barred,[110] the Commission specifically prohibited competing satellite systems from interconnecting through a data circuit "terminat[ing] in a computer that can store and process the data and subsequently retransmit it over that network."[111]

58. We disagree with those commenters who argue that the *Data Com* and *Millicom* cases should guide us to a different result. In *Data Com,* the Commission found that no interconnection was involved in a communications system where callers wishing to page subscribers placed a call through the PSN to an answering service which then relayed the message to the intended recipient by activating the Data Com transmitter through a private radio link. We held that the Data Com system was not providing interconnected service because there was no direct connection between the Data Com transmitter and the PSN.[112] While the *Millicom* case involved a system that used store and forward technology, this fact was not pertinent to our decision there because that decision turned on whether the licensee was operating a shared-use system that would subject it to the interconnection prohibition contained in the prior version of Section 332.[113]

59. The statute also requires the Commission to define the term "public switched network." The Commission has frequently used the term "public switched telephone network" (PSTN) to refer to the local exchange and interexchange common carrier switched network, whether by wire or radio.[114] Many parties urge the Commission to continue this approach to defining the public switched network. We agree with commenters who argue that the network should not be defined in a static way. We believe that this interpretation is also more consistent with the use of the term "public switched network," rather than the more technologically based term "public switched telephone network." The network is continuously growing and changing because of new technology and increasing demand. The purpose of the public switched network is to allow the public to send or receive messages to or from anywhere in the nation. Therefore, any switched common carrier service that is interconnected with the traditional local exchange

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[109] *International Satellite Systems,* 101 FCC 2d at 1054. An exception was made for emergency restoration service.

[110] *Id.* at 1100.

[111] *Id.* at 1101.

[112] Data Com, Inc., Declaratory Ruling, 104 FCC 2d 1311, 1315 & n.7 (1986). In the *Data Com* case, we found that no aspect of the service provided by Data Com was dependent upon any direct or indirect physical connection to the public switched network. In contrast, there can be services in which some transmitters used in providing the service are not physically connected to the network but the service is treated as interconnected because its overall configuration includes physical links with the PSN.

[113] Applications of Millicom Corporate Digital Communications, Memorandum Opinion and Order, 65 Rad. Reg (P&F) 235, 237-39 (1983), *aff'd sub nom.* Telocator Network of America v. FCC, 761 F.2d 763 (D.C. Cir. 1985).

[114] For example, in establishing the Basic Exchange Telecommunications Radio Service (BETRS) we held that it was "intended to be an extension of intrastate basic exchange service." *BETRS Order,* 3 FCC Rcd at 217. In particular, we explained that "BETRS is provided so that radio loops can take the place of (expensive) wire or cable to remote areas." *Id.*

or interexchange switched network will be defined as part of that network for purposes of our definition of "commercial mobile radio services."[115]

60. A mobile service that offers service indirectly interconnected to the PSN through an interconnected commercial mobile radio service, such as a cellular carrier, will be deemed to offer interconnected service because messages could be sent to or received from the public switched network via the cellular carrier. We agree with Nextel and Pacific that use of the North American Numbering Plan[116] by carriers providing or obtaining access to the public switched network is a key element in defining the network because participation in the North American Numbering Plan provides the participant with ubiquitous access to all other participants in the Plan. We find that another important element is switching capability, which the term "public *switched* network" implies. This includes any common carrier switching capability, not only a local exchange carrier's switching capability. Thus, we believe that this approach to the public switched network is consistent with creating a system of universal service where all people in the United States can use the network to communicate with each other.

c. Service Available to the Public

(1) *Background and Pleadings*

61. The last element of the commercial mobile radio service definition is that the service must be made available to the public. Specifically, the statute provides that, if a licensee offers a for-profit service and makes interconnected service "available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public," then it is a commercial mobile radio service.[117] In the *Notice*, we interpreted the language "to the public" as contemplating "any interconnected service that is offered to the public without restriction, as existing common carrier services are offered."[118] The *Notice* also sought comment regarding (1) what types of services are "offered to such classes of eligible users as to be effectively available to a substantial portion of the public"; (2) whether such services that are "effectively available" include those offerings that are "available to a substantial portion

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[115] It is important to note, however, that defining a carrier as part of the public switched network does not impose any interconnection obligations upon that carrier. Interconnection obligations flow from a common carrier's Section 201 obligations if the Commission finds that such connections are in the public interest. The question of whether we will require CMRS providers to offer interconnection to their facilities to other CMRS providers or other parties requesting interconnection will be examined in a separate proceeding. *See* para. 285, *infra.* Moreover, our defining a carrier as part of the PSN for purposes of our definition of "commercial mobile radio service" is not intended to alter or modify the extent to which any such carrier may be subject to any obligations or requirements (*e.g.*, network reliability reporting, open network architecture) other than those contained in Section 332 of the Act or in regulations promulgated by the Commission pursuant to Section 332.

[116] The Plan provides a method of identifying telephone lines in the public network of North America. The Plan has three ways of identifying phone numbers: a three digit area code, a three digit exchange or central office code, and a four digit subscriber code. Currently, Bell Communications Research (Bellcore) administers this plan. The Commission has initiated a proceeding related to the North American Numbering Plan, and, in particular, the impending shortage of telephone numbers. *See* Administration of the North American Numbering Plan, CC Docket No. 92-237, Notice of Inquiry, 7 FCC Rcd 6837 (1992).

[117] Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

[118] The statute directs the Commission to "specify by regulation" such classes of eligible users as to be "effectively available to a substantial portion of the public." *Id.*

of the public'' despite limitations on end user eligibility; (3) whether system capacity should be a factor in determining whether a service is ''effectively available'' to the public; and (4) whether service area size or ''location-specificity'' in service offerings ought to be a consideration in finding that a service is not ''effectively available'' to the public.

62. The majority of commenters discuss two basic issues in relation to the ''to the public'' prong of the commercial mobile radio service definition, namely: (1) how should the phrase ''to the public'' be interpreted; and (2) what should be the appropriate test for determining which services are ''effectively available to a substantial portion of the public.'' Many commenters agree that a particular mobile service should be considered available ''to the public'' only if it is available to the public either without restriction or without distinction.[119] BellSouth, however, asserts a service could be considered publicly available even if the Commission's Rules place some minimal restrictions on end user eligibility.[120] Similarly, Sprint states that the ''public'' need not encompass the entire universe of potential users.[121] US West urges the Commission to limit the number and type of factors that the Commission considers in determining public availability in order to avoid case-by-case analysis.[122] Lastly, MPX maintains that services that limit their customer base by means of elected negotiations, such as SMRs, should not be deemed to be available to the public.[123]

63. The second ''public availability'' element requires inquiry into whether the interconnected mobile service is made available ''to such classes of eligible users as to be effectively available to a substantial portion of the public.'' Many commenters and reply commenters assert that this element should be interpreted to exclude services that are available only to classes of eligibles comprised of only specific industries, businesses, or other narrow eligibility classes.[124] Several other commenters and reply commenters, however, favor applying a test for the ''effectively available'' element requiring that, if service is available or intended to be available, to a large sector of the public, irrespective of any eligibility restrictions, it should be deemed to be effectively available to a substantial portion of the public.[125]

64. Commenters also address the issues whether limited capacity on a system restricts whether it is effectively available to a substantial portion of the public, and whether a location-

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[119] *See, e.g.*, E.F. Johnson Comments at 7; GTE Comments at 6; McCaw Comments at 18; Motorola Comments at 8; NABER Comments at 10; New York Comments at 7; Nextel Comments at 11; PageNet Comments at 11-12.

[120] BellSouth Comments at 11.

[121] Sprint Comments at 7.

[122] US West Comments at 19.

[123] MPX Comments at 4.

[124] *See, e.g.*, AAR Comments at 4; Arch Comments at 5 n.13; ARINC Comments at 5-6; GTE Comments at 7; Motorola Comments at 8; NABER Comments at 10; Reed Smith Comments at 3; Roamer Comments at 9; TDS Comments at 8; UTC Comments at 11; AAR Reply Comments at 4; Securicor Reply Comments at 6; Telocator Reply Comments at 4.

[125] *See, e.g.*, Bell Atlantic Comments at 11; CTIA Comments at 10; Mtel Comments at 8 ; New York Comments at 7; NARUC Comments at 17; Pacific Comments at 7-8; PacTel Comments at 12-13; Rochester Comments at 5; Southwestern Comments at 9; Sprint Comments at 8; Telocator Comments at 11; USTA Comments at 6; US West Comments at 19-21; Vanguard Comments at 6-7; McCaw Reply Comments at 23-24; PA PUC Reply Comments at 8; USTA Reply Comments at 3-4; US West Reply Comments at 5-6.

specific service or one offered only in a limited geographic area would not be effectively available to the public. As to the first issue, many commenters and reply commenters agree that low capacity has no effect on the public availability of a service.[126] E.F. Johnson, however, maintains that low capacity is a valid factor in restricting the public availability of a service.[127] Several commenters further agree that location-specificity and limited geographic area are irrelevant to a determination of public availability.[128] GTE and Roamer, however, maintain that location-specificity and limited geographic area do significantly restrict the public availability of a service.[129]

(2) *Discussion*

65. We agree with commenters who contend that a service is available "to the public" if it is offered to the public without restriction on who may receive it. For example, PageNet asserts that private carrier paging (PCP) is available to the public without restriction because the "last significant eligibility" limitation was removed when PCPs were authorized to serve individuals, in addition to Part 90 eligibles. We agree. Nor do we find compelling MPX's assertion that services that limit their customer base by means of elected negotiations should be deemed to be unavailable to the public. In addition, we believe that similarly situated customers should have the opportunity to obtain service on the same terms as negotiated by other customers, unless, of course, the carrier is able to demonstrate that any distinctions in terms do not constitute unreasonable discrimination under Section 202(a) of the Act.[130]

66. In parsing the language "to such classes of eligible users as to be effectively available to a substantial portion of the public" in Section 332(d)(1)(B) of the Act, we believe that the key words are "effectively available." In drafting this language, Congress eschewed the House definition's use of the word "broad" to modify the phrase "classes of eligible users" and

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[126] *See, e.g.*, Arch Comments at 5-6; Bell Atlantic Comments at 12; BellSouth Comments at 13; CTIA Comments at 10; DC PSC Comments at 6; GTE Comments at 7; Mtel Comments at 8; Motorola Comments at 8-9; NYNEX Comments at 11; Pacific Comments at 8-9; PageNet Comments at 11; Rochester Comments at 5 n.9; Southwestern Comments at 10-11; Sprint Comments at 8; TDS Comments at 9; Telocator Comments at 12; US West Comments at 20; UTC Comments at 11-12; Vanguard Comments at 7; McCaw Reply Comments at 24; Telocator Reply Comments at 4; Arch Reply Comments at 5; *but see* GTE Reply Comments at 4; Securicor Reply Comments at 6.

[127] E.F. Johnson Comments at 7.

[128] *See, e.g.*, Bell Atlantic Comments at 12; CTIA Comments at 10; DC PSC Comments at 6; McCaw Comments at 18; Motorola Comments at 8-9; Mtel Comments at 8; Pacific Comments at 9; PageNet Comments at 11; Rochester Comments at 5; Southwestern Comments at 10-11; Sprint Comments at 8 n.11; TDS Comments at 10; US West Comments at 20; UTC Comments at 11-12; Vanguard Comments at 7.

[129] GTE Comments at 7; Roamer Comments at 10.

[130] The terms and conditions for different classes of customers may, of course, vary. Whether such differences are lawful would be a question of whether there is unreasonable discrimination under Section 202(a) of the Act. In the case of individualized or customized service offerings made by CMRS providers to individual customers, it is our intent to classify and regulate such offerings as CMRS, regardless of whether such offerings would be treated as common carriage under existing case law, if the service falls within the definition of CMRS.

adopted instead the Senate's version which deleted the word "broad," indicating legislative intent to:[131]

> ensure that the definition of "commercial mobile services" encompasses all providers who offer their services to broad or narrow classes of users so as to be effectively available to a substantial portion of the public.

Thus, Congress intended both broad and narrow classes of eligible users that meet the statutory definition to be included within this element. The statute directs the Commission to specify those classes in its regulations.

67. In applying the statutory language, we look to several relevant factors, such as the type, nature, and scope of users for whom the service is intended.[132] Thus, in the case of existing eligibility classifications under our Rules,[133] service is *not* "effectively available to a substantial portion of the public" if it is provided exclusively for internal use or is offered only to a significantly restricted class of eligible users, as in the following services: (1) Public Safety Radio Services;[134] (2) Special Emergency Radio Service;[135] (3) Industrial Radio Services (except for Section 90.75, Business Radio Service);[136] (4) Land Transportation Radio Services;[137] (5) Radiolocation Services;[138] (6) Maritime Service Stations;[139] and (7) Aviation Service Stations.[140] Service among these Part 90 eligibility groups, or to internal users, is made available on only a limited basis to insubstantial portions of the public. We conclude that it was Congress's intent that making service available to, or among, the eligible users in the above-stated private mobile radio services does not constitute service that is "effectively available to a substantial portion of the public." Finally, 220-222 MHz band and private paging systems that serve only the licensee's internal needs will not be deemed "effectively available

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[131] Conference Report at 496.

[132] The statutory language warrants looking at several factors where the word "substantial" modifying "portion of the public" could mean either "considerable; ample; large" or "of considerable worth or value; important." Webster's New World Dictionary, Third College Edition, 1336 (1988).

[133] Our description here applies the test to existing classes of eligible users. We recognize, of course, that other classes could be established under our Rules in the future that would not be "effectively available to a substantial portion of the public" depending on the type, nature, and scope of users for whom the service is intended.

[134] 47 C.F.R. §§ 90.15-90.25.

[135] 47 C.F.R. §§ 90.33-90.55.

[136] 47 C.F.R. §§ 90.59-90.73, 90.79, 90.81.

[137] 47 C.F.R. §§ 90.85-90.95.

[138] 47 C.F.R. §§ 90.101, 90.103.

[139] 47 C.F.R. § 80.15.

[140] 47 C.F.R. § 87.19.

to a substantial portion of the public,'' because our rules restrict use of those services to internal applications.[141]

68. In contrast, if a licensee operates a system not dedicated exclusively to internal use, or provides service to users other than eligible user groups under our rules like those in the services listed in the preceding paragraph, it *is* offering service that is ''effectively available to a substantial portion of the public.'' Thus, the eligibility provisions for the Business Radio Service (BRS), PCPs (other than internal use), commercial 220-222 MHz land mobile systems, and SMRs would permit service offerings effectively to a ''substantial portion'' of the public. The Part 90 eligibility rules for all types of SMRs, commercial 220-222 MHz land mobile systems, and PCPs, for example, include individuals as a category of eligible customers. Furthermore, eligible users in the BRS generally include any persons engaged in the operation of commercial activities, educational, philanthropic, or ecclesiastical institutions, clergy activities, and hospitals, clinics, or medical associations.[142] We believe that end user eligibility is virtually unrestricted in the Business Radio Service and offerings in that Service are therefore made effectively available to a substantial portion of the public. Our classification of BRS illustrates the fact that a service may be classified as ''effectively available to a substantial portion of the public'' regardless of whether individuals are eligible to receive the service. In addition, Automatic Vehicle Monitoring services that are offered to third party users will be deemed ''effectively available to a substantial portion of the public,'' because our interim rules authorize service to persons eligible in the radio services of Part 90.[143]

69. Under the ''system capacity'' exception proposed in the *Notice*, any licensee whose system has limited capacity, such as an SMR with the capacity of no more than 70 to 100 users per channel, would be deemed to be offering a service that was not effectively available to a substantial portion of the public. We agree with those commenters who argue that adopting the ''system capacity'' approach would undermine the plain meaning of the statute, and Congress's intent in passing it. Although a service has low system capacity, it may nonetheless be available

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[141] *See generally* Sections 90.703(b), 90.717, 90.721, 90.723(a), 90.733(a)(2), 90.733(a)(3), and 90.733(b) of the Commission's Rules, 47 C.F.R. §§ 90.703(b), 90.717, 90.721, 90.723(a), 90.733(a)(2), 90.733(a)(3), 90.733(b); Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Memorandum Opinion and Order, 7 FCC Rcd 4484, 4490-91 (1992)(220 MHz local channels in commercial or non-commercial status; non-commercial nationwide licenses are for primary purpose of satisfying internal communications requirements, but licensee may elect to provide commercial service on limited basis at end of five-year period following grant of license). *See also, e.g.*, Section 90.494(a) of the Commission's Rules, 47 C.F.R. § 90.494(a) (900 MHz paging frequencies available to all Part 90 eligibles for commercial or non-commercial use). Licensees in these services that have elected to operate not-for-profit internal systems are barred by the terms of their licenses from offering a for-profit commercial service. Such internal systems also are treated as not-for-profit for purposes of the CMRS definition. *See* para. 44, *supra*.

[142] Section 90.75 of the Commission's Rules, 47 C.F.R. § 90.75; *see also* Amendment of Part 90 of the Commission's Rules To Expand Eligibility and Shared-Use Criteria for Private Land Mobile Frequencies, PR Docket No. 89-45, Report and Order, 6 FCC Rcd 542 (1991).

[143] Section 90.239 of the Commission's Rules, 47 C.F.R. § 90.239. In addition, we have granted a waiver to Teletrac to allow it to offer service to individuals. *See* Amendment of Part 90 of the Commission's Rules To Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, Notice of Proposed Rule Making, 8 FCC Rcd 2502, 2502-03 (1993). This Notice also proposes expanding the eligibility of this service to include individuals and the Federal Government. *Id.* at 2503.

"to the public."[144] Even if system capacity were relevant to a determination of a given mobile service's public nature, setting a standard for what constitutes a low capacity system would involve guesswork in a rapidly changing area where system-efficient technologies are constantly squeezing more capacity from smaller volumes of spectrum, and might provide incentives for inefficient spectrum use. In addition, therefore, we conclude that low system capacity should not be a factor in determining whether a class of eligible users makes the service "effectively available to a substantial portion of the public."

70. Lastly, we address the issue raised in the *Notice* whether a limitation in the geographic size of a service area ought to be a factor in deciding that a service is not "available to the public" or "effectively available to a substantial portion of the public." We agree with commenters who contend that geographic area or location specificity should not be a factor in our determination. We conclude that irrespective of the service area in which a given licensee is operating, if that licensee is serving such classes of eligible users as to be in effect making its service usable by a substantial portion of the public in that area, it is a service available to the public. This conclusion is consistent with the statute and congressional intent. Classifying the mobile service as a commercial mobile radio service, even though its offering is restricted to a limited geographic area will best serve the congressional objective of ensuring that telecommunications providers that compete with one another in any geographic area are subject to the same regulatory requirements and standards. Furthermore, we believe that finding a location-specific service not to be publicly available would be spectrally inefficient because it may produce disincentives to licensees to build out their systems into wide-area networks. At the same time, as wireless technologies move toward microcell and picocell environments, we believe that it would not serve the public interest to allow such state-of-the-art technology, albeit reserved to small areas, to be restricted from the general public.

3. *Private Mobile Radio Service*

a. Background and Pleadings

71. The statute defines private mobile service as "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a

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[144] Apart from situations involving carriers of last resort, *see, e.g.*, United Fuel Gas. Co. v. Railroad Comm'n, 278 U.S. 300, 309 (1929)("The primary duty of a public utility is to serve on reasonable terms all those who desire the services it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give."); *see also* American Tel. & Tel., Memorandum Opinion and Order, 73 FCC 2d 248, 263 (1979), the common carriage obligation extends only to the provision of "adequate or reasonable" facilities in response to demand:

> The term "adequate or reasonable" is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for [service], the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost.

Atlantic Coast Line R.R. v. Wharton, 207 U.S. 328, 335 (1907); *see* New York ex rel. Woodhaven Gas Light Co. v. Pub.Serv.Comm'n, 269 U.S. 244, 248 (1925). Thus, under longstanding principles of common carriage regulation, the carrier's costs in "furnishing the additional accommodations" are a relevant factor in determining the nature and extent of the carrier's obligation to provide service.

commercial mobile service, as specified by regulation by the Commission.''[145] The *Notice* described two alternative interpretations of this definition. Under one approach, a mobile service would be classified as private if (1) it fails to meet the statutory definition of a commercial mobile radio service *or* (2) it is not the functional equivalent of a commercial mobile radio service, even if it meets the literal definition of a commercial mobile radio service. Under another reading of the legislation, a mobile service would be classified as private if (1) it fails to meet the statutory definition of a commercial mobile radio service; *and* (2) it is not the functional equivalent of a commercial mobile radio service. In addition, we requested comment on what specific standards the Commission should use to determine whether a given service is the functional equivalent of a commercial mobile radio service.

72. Commenters disagree about the correct interpretation of the definition of private mobile radio service. Some commenters urge the Commission to adopt a broad definition of PMRS, so that the term would include any service that is not a commercial mobile radio service as well as a mobile service which may meet the literal definition of a CMRS, but is not the functional equivalent of a service that is deemed to be CMRS.[146] These parties generally refer to the example in the Conference Report, of a service that the Commission might classify as private, to support their position.[147] Commenters advocating a broad definition of private mobile radio service contend that their interpretation is consistent with the congressional intent to create regulatory symmetry for similar services.[148] In general, these commenters argue that Congress was concerned about regulatory symmetry between wide-area SMRs and cellular carriers and, therefore, Congress did not intend to apply Title II regulation to mobile services that are not the functional equivalent of commercial mobile radio services even if the services fall within the technical definition of CMRS.[149] Reed Smith also argues that the language of the statute is not ambiguous and compels a broad interpretation of private mobile radio service.[150] In addition, UTC asserts that, in adding the functional equivalence test, Congress did not change the definition of commercial mobile radio service. Rather, Congress added an

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[145] Communications Act, § 332(d)(3), 47 U.S.C. § 332(d)(3).

[146] AMT/DSST Comments at 7-8; AMTA Comments at 12-13; E.F. Johnson Comments at 7-8; Geotek Comments at 5; ITA Comments at 2-4; LCRA Comments at 8-9; Motorola Comments at 9; NABER Comments at 11; Pagemart Comments at 8; Reed Smith Comments at 6; Roamer Comments at 11-12; RMD Comments at 5-6; Securicor Reply Comments at 7; Time Warner Comments at 5-6; TRW Comments at 16 n.33; UTC Comments at 12-13.

[147] AMT/DSST Comments at 7-8; AMTA Comments at 13; E.F. Johnson Comments at 7-8; Geotek Comments at 6-7; Motorola Comments at 9-10; NABER Comments at 11; Pagemart Comments at 9; Reed Smith Comments 7-9; Roamer Comments at 12; RMD Comments at 5-6; Securicor Reply Comments at 7-8; TRW Reply Comments at 19; UTC Comments at 14. *See* Conference Report at 496.

[148] AMT/DSST Comments at 7-8; E.F. Johnson Comments at 8; ITA Comments at 3-5; Motorola Comments at 10; Pagemart Comments at 9; Roamer Comments at 11-12; RMD Comments at 5-6; Securicor Reply Comments at 8; Time Warner Comments at 6; UTC Comments at 13.

[149] AMT/DSST Comments at 7; ITA Comments at 3-5; Motorola Comments at 10; RMD Comments at 5-6; UTC Comments at 13. *See also* AMTA Comments at 12 (claiming that Congress was also concerned that PCS services that provided a cellular or local loop-type service would be classified as common carriage); Roamer Comments at 11-12 (including wide-area private carrier paging systems as services that prompted the legislation).

[150] Reed Smith Comments at 6; *accord* UTC Reply Comments at 13.

escape valve for classifying services as private even if they meet the literal definition of CMRS.[151]

73. Many other parties argue that the Commission should adopt a narrow interpretation of private mobile radio service, which would include any mobile service that is not a commercial mobile radio service and is not the functional equivalent of a CMRS.[152] In support of this interpretation, these commenters generally refer to the language in the Conference Report that the term private mobile service includes "*neither* a commercial mobile service *nor* the functional equivalent of a commercial mobile service."[153] Commenters advocating a narrow interpretation of the definition of private mobile radio service agree with parties advocating a broad interpretation that Congress intended to create regulatory symmetry for similar services.[154] They conclude, however, that Congress would not have created a technological distinction, like the example in the Conference Report, to allow similar services to be subject to differing regulatory schemes. After all, argue many of these commenters, Congress was attempting to remove regulatory disparities based on technical distinctions.[155]

74. Some commenters also suggest that the clear language of the statute goes against the broad definition of private mobile radio service. BellSouth notes that it is difficult to imagine how a service could meet the statutory definition of commercial mobile radio service and not be the functional equivalent of CMRS. Any service meeting the statutory criteria and Commission definitions for CMRS is, by definition, the functional equivalent of itself. It is therefore not only a commercial mobile radio service, but also the functional equivalent of a commercial mobile radio service.[156] According to US West, the sole support for the broad interpretation of private mobile radio service is the language from the Conference Report which does not support the proposition for which it is cited. The example could not refer to a service falling within the literal definition of CMRS, argues US West, because it does not describe a for-profit service.

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[151] UTC Comments at 14.

[152] Arch Comments at 6; Bell Atlantic Comments at 13; BellSouth Comments at 20; CTIA Comments at 11-13; DC PSC Comments at 7; GCI Comments at 2; GTE Comments at 8; McCaw Comments at 19-20; MCI Comments at 6; Mtel Comments at 9; NARUC Comments at 18-19; NTCA Comments at 2-3; New Par Comments at 7-8; New York Comments at 8; NYNEX Comments at 12; PA PUC Reply Comments at 9; Pacific Comments at 7; Pactel Comments at 7-8; Rochester Reply Comments at 3; Southwestern Comments at 11-12; Sprint Comments at 9; TDS Comments at 10; USTA Comments at 6; US West Comments at 7-8; Vanguard Comments at 8-9.

[153] Conference Report at 496 (emphasis added). Bell Atlantic Comments at 13; DC PSC Comments at 7; Mtel Comments at 9; NARUC Comments at 19; PA PUC Reply Comments at 9 & n.21; Pacific Comments at 7 n.15; Southwestern Comments at 12; US West Comments at 8-9; USTA Reply Comments at 4-5; Vanguard Comments at 8.

[154] Bell Atlantic Comments at 13; CTIA Comments at 11; GTE Comments at 8; McCaw Comments at 19-20; NARUC Comments at 19; New Par Comments at 7; NYNEX Comments at 12; TDS Comments at 10-11; Vanguard Comments at 8.

[155] *See* Bell Atlantic Comments at 13-14; CTIA Comments at 13-14; GTE Comments at 8; McCaw Comments at 20 & n.55.

[156] BellSouth Comments at 22 n.67. *See also* Southwestern Comments as 13 (arguing that a broad definition of "private" assumes that a commercial service is not defined by its own definition); US West Comments at 8-9 (claiming that a broad interpretation of private mobile radio service implausibly presupposes that there are commercial mobile radio services which would not be the functional equivalent of commercial mobile radio service).

Importantly, according to some commenters, this statement in the Conference Report follows the "neither/nor" language[157] that makes indisputable that the functional equivalence analysis applies only to those services which do not meet the commercial mobile radio service definition.[158] Nextel, on the other hand, submits that both interpretations of private mobile radio service are correct and effectuate Congress's directive that functionally equivalent or substitutable services must be subject to similar regulation.[159]

75. Some commenters and reply commenters support the proposal in the *Notice* to adopt the functional equivalence test used to determine whether a common carrier unreasonably discriminates in its charges for like communications services.[160] CTIA urges the Commission to also apply precedent from the relevant market analysis used in antitrust law.[161] Commenters criticize adopting a technological test like that described in the Conference Report, because different technologies are capable of providing comparable services.[162] NYNEX urges the Commission to adopt general rules regarding the functional equivalence test.[163] McCaw, on the other hand, believes that the Commission should determine functional equivalence on a case-by-case basis when a service is authorized.[164] A few commenters and reply commenters disagree with the proposal in the *Notice* to adopt the functional equivalence test used by the Commission in discrimination cases.[165] For example, Geotek argues that the functional equivalence test should focus on whether the interconnected portion of the service is the primary service offered or only secondary or incidental to the primary service.[166]

b. Discussion

(1) *Scope of Definition*

76. We agree with commenters who argue that Congress intended to narrow the scope of the definition for private mobile radio service by adding language stating that a mobile service would be considered to be private if it is not the functional equivalent of a commercial mobile radio service. Given this congressional intent, we conclude that a mobile service may be

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[157] *See* para. 73, *supra.*

[158] US West Comments at 8; *accord* CTIA Reply Comments at 13.

[159] Nextel Comments at 13-14.

[160] CTIA Comments at 11-13; DC PSC Comments at 7-8; GTE Comments at 8; Mtel Comments at 10; NABER Comments at 11; NARUC Comments at 19-20; Nextel Reply Comments at 5-7; NYNEX Comments at 13; PA PUC Reply Comments at 9-10; Pacific Comments at 8; TDS Comments at 11; Telocator Reply Comments at 6; USTA Comments at 6; Vanguard Comments at 9.

[161] CTIA Comments at 11-13.

[162] McCaw Comments at 20 n.55; NYNEX Comments at 12-13; PRSG Comments at 2; Southwestern Comments at 14; Telocator Comments at 13 n.18; US West Reply Comments at 8; Vanguard Comments at 9.

[163] NYNEX Comments at 13-14; *see also* Time Warner Comments at 6-7.

[164] McCaw Comments at 21-22; *see also* PA PUC Reply Comments at 10; TRW Comments at 26 n.51; UTC Comments at 14-15.

[165] *See, e.g.*, E.F. Johnson Comments at 8; Motorola Comments at 10-11; Southwestern Comments at 13-14; TRW Reply Comments at 20 n.42.

[166] Geotek Comments at 7-8.

classified as private only if it is neither a CMRS nor the functional equivalent of a CMRS. The factors that have led us to this conclusion are: the plain language of the statute, statements in the legislative history, and the overall purpose of the statute. First, we believe that our conclusion draws its strongest support from the plain words of the statute. As we have noted, Section 332(d)(3) of the Act provides that a mobile service may be classified as a PMRS only if it is *not* a commercial mobile radio service *or* the functional equivalent of a CMRS. We believe that the most logical method of applying this statutory test is as follows: If we conclude that a mobile service is offered to the public (or a substantial portion of the public), is offered for profit, and is an interconnected service, then we must conclude that the mobile service is a commercial mobile radio service because the nature of the service brings it within the statutory definition of commercial mobile radio services. Once we have concluded that a mobile service falls within the literal statutory definition of a CMRS, it is logically impossible, under the statute, to conclude that the service could be classified as a private mobile radio service. The statute unequivocally states that a private mobile radio service is not a commercial mobile radio service. It would be inconsistent with the statute to say that the term "commercial mobile radio service" is not defined by the elements stated in Section 332(d)(1), but by some benchmark CMRS that Congress did not specify (such as one that employs frequency reuse or covers a particular geographic area, as suggested by some commenters). As BellSouth notes, if a service meets the definition of CMRS it is difficult to conceive how it could not be the functional equivalent of CMRS, *i.e.*, of itself. On the other hand, if we conclude that a mobile service does *not* meet the literal definition of a commercial mobile radio service, we will presume that the service is private and it will be regulated as PMRS unless there is a showing in a specific case that it is the functional equivalent of a service that is classified as CMRS. Thus, the language of the statute clearly provides that if a mobile service meets the literal definition of a CMRS or it is found to be the functional equivalent of a service that does meet the literal definition of CMRS, it cannot be classified as a PMRS.

77. Second, the Conference Report supports this interpretation. The Report states that the Conference Committee amended the definition of private mobile radio service to "make clear that the term includes *neither* a commercial mobile service *nor* the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[167] Thus, the Conference Report specifies that any mobile service that falls within the literal definition of a CMRS *cannot* be classified as a private service. We recognize, as some commenters have pointed out, that the Conference Report provides a specific example where the Commission *may* determine that a service is not the functional equivalent of a CMRS because it does not employ frequency or channel reuse or make service available to a wide geographical area.[168] This example, however, does not necessarily represent a mobile service that fits the literal definition of a commercial mobile radio service because the example does not indicate whether the service is for profit. Also, the Conference Report cannot be read to *require* the Commission to find that such a service is not the functional equivalent of a CMRS. Congress intended to leave this issue to the Commission's expertise. Further, the language of a statute "is not to be regarded as modified by examples set forth in the legislative history."[169] Thus, the specific example in the Conference Report cannot drive us away from the conclusion compelled by the plain words of Section 332(d)(3). We believe that our interpretations of the individual elements of CMRS ensure that services that do not compete with commercial mobile radio services will be classified as private. For example, a for-profit service will be presumptively private only if it is not an interconnected service or it is not offered to the public or a substantial portion of the public.

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[167] Conference Report at 496 (emphasis added).

[168] *Id.*; *see also* CTIA Reply Comments at 13.

[169] Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 649 (1990).

78. The third factor supporting our interpretation of the term "private mobile radio service" is the fact that the interpretation comports with the statute's overriding purpose to ensure that similar services are subject to the same regulatory classification and requirements.[170] Although the language referring to the functional equivalent of a CMRS was added by the conferees, the House Report expresses concern about the functional equivalent of a common carriage offering being regulated as a private service. The House Report states:[171]

> Under current law, private carriers are permitted to offer what are essentially common carrier services, interconnected with the public switched telephone network, while retaining private carrier status. Functionally, these "private" carriers have become indistinguishable from common carriers . . . .

The House illustrated its concern over the disparate regulatory treatment that has emerged under current law by specifically referring to the expanded definition of eligible user for specialized mobile radio service and private carrier paging licensees, to include individuals on an indiscriminate basis and Federal Government entities. The discussion also refers to enhanced specialized mobile radio services. Thus, under the approach taken in the House Report, even if a mobile service does not fit within the strict definition of a commercial mobile radio service, if the service amounts to the "functional equivalent" of a service that is classified as CMRS, it should be regulated as a CMRS. We do not find any clear intent that in adopting the final language Congress intended to depart from this purpose of the statute.

(2) *Functional Equivalence Test*

79. As explained in the preceding section, the definition of private mobile radio service includes any service that does not meet the definition of CMRS. The statute further provides, as explained above, that PMRS also does not include a service that is the functional equivalent of a CMRS. The statute grants the Commission authority to specify the functional equivalent of CMRS. We have broadly interpreted the definitional elements of CMRS because Congress intended this definition to ensure that the Commission regulate similar mobile services in a similar manner. Thus, we anticipate that very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service. Therefore, we will presume that a mobile service that does not meet the definition of CMRS is a private mobile radio service. This presumption may be overcome only upon a showing by a petitioner challenging the PMRS classification that the mobile service in question is the functional equivalent of a commercial mobile radio service.[172]

80. Based on such a showing and any other relevant evidence or matters that the Commission may officially notice, the Commission will evaluate a variety of factors in deciding whether the service under review is the functional equivalent of a commercial mobile radio service. Our principal inquiry will involve evaluating consumer demand for the service in order

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[170] *See* Part II.A, paras. 3-10; Part III.A.1, paras. 13-17, *supra.*

[171] House Report at 259-60 (footnotes omitted).

[172] We note that the presumption that we adopt here is not to be confused with the presumption we establish for PCS. *See* Part III.D, paras. 116-123, *infra.* In relation to PCS we decide that all PCS is presumptively CMRS. The significance of the presumption in the PCS context is that licensees receiving PCS spectrum *must* use the spectrum to provide CMRS, unless they make a sufficient showing that they should be permitted to use some or all of their allocated PCS spectrum on a private basis. Here we have established generic definitions of CMRS and PMRS. Our presumption in the PCS context, in applying these generic definitions, is based on our expectation that CMRS classification will fit these new services and will most adequately meet the goals we have established for PCS.

to determine whether the service is a close substitute for CMRS. For example, we will evaluate whether changes in price for the service under examination, or for the comparable commercial service, would prompt customers to change from one service to the other. Market research information identifying the targeted market for the service under review also will be relevant. Of course, we will refine this examination in the context of the individual cases that may arise based on a showing by any interested party.[173]

C. Regulatory Classification of Existing Services

81. In the *Notice* we explained that the Budget Act requires us to examine the regulatory status of all existing mobile services under the statutory definitions discussed in the preceding sections. We therefore sought comment on whether existing mobile services should be classified as CMRS or PMRS. The following sections explain our classification, based on the definitions of CMRS and PMRS, of existing services as they are currently provided. We recognize, however, that the manner in which these services are provided may change over time, and that these changes may require reclassification.

1. *Existing Private Services*

a. Government, Public Safety, and Special Emergency Radio Services

82. We proposed in the *Notice* to classify all existing government and public safety mobile services as private mobile services under Section 332(d)(3) of the Act. The commenters uniformly support this tentative conclusion.[174] Because our rules restrict use of these services to local governments and public safety organizations, they are not available "to the public" or a "substantial portion of the public" within the meaning of Section 332(d). In addition, with the exception of the Special Emergency Radio Service, these service categories are limited to not-for-profit use. We therefore conclude that, as proposed, all government, public safety, and Special Emergency services regulated under Part 90, Subparts B and C, will be classified as PMRS and will continue to be regulated as they have been.

b. Aviation, Marine, and Personal Radio Services

83. The *Notice* proposed to classify all mobile service licensees in the Part 80 marine services and Part 87 aviation services (with the exception of Public Coast Station licensees, who are currently regulated as common carriers) as PMRS on the grounds that these are not-for-profit systems. We also proposed to classify personal mobile radio services under Part 95 as PMRS on the same basis. The comments generally support this approach.[175] Therefore, we conclude that all mobile services under Parts 80, 87, and 95 will be classified as PMRS, except for Public Coast Station service (Part 80, Subpart J), which will be classified as CMRS. We also note that this action does not apply to *fixed* services under these rule parts, which are beyond the purview of Sections 3(n) and 332 of the Act. Thus, Operational Fixed Station licensees under Part 80, Subpart L, and Part 87, Subpart P, and Interactive Video and Data Service, which we have also determined to be a fixed service, are not affected by this Order.

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[173] The procedures for overcoming the presumption that a mobile service provider should be regulated as PMRS are specified in Section 20.9(a) of the Commission's Rules, as adopted in this Order. *See* Appendix A.

[174] *See, e.g.*, AAR Comments at 4-5; AAR Reply Comments at 2-3; American Petroleum Comments at 6; DC PSC Comments at 8; PRSG Comments at 2.

[175] *See, e.g.*, ARINC Comments at 4-6; PRSG Comments at 2; Grand Comments at 2.

c. Industrial and Land Transportation Services

84. In lieu of a specific proposal for classification of the Industrial and Land Transportation Services (regulated under Part 90, Subparts D and E of our Rules),[176] we sought general comment on how the statutory definitions should apply to licensees in these service categories. The *Notice* tentatively concluded that licensees operating systems for internal use should be deemed not-for-profit within the meaning of the statute and therefore classified as PMRS. In addition, we noted that because many of these private land mobile services are specifically targeted to specific businesses, industries, or user groups, they are arguably not intended for the public or even a substantial portion of the public. We therefore sought comment on whether for-profit service in these categories should be classified as PMRS as well.

85. Virtually all commenters agree that PMRS classification is appropriate for licensees in any of the Industrial or Land Transportation Services who operate systems solely for their own internal use.[177] As discussed in Part III.B.2.a, paras. 39-49, *supra*, however, commenters are divided on the issue of whether a private non-commercial licensee should be classified differently if it leases excess capacity or enters into a shared-use arrangement with other users.[178] Commenters also express differing views on whether private carriers in the Industrial and Land Transportation Services make service available to a "substantial portion of the public" within the meaning of Section 332(d). Many commenters argue that the eligibility restrictions for these services limit their use to such specialized user groups that they should be uniformly classified as private services.[179] Other commenters contend that even existing private services designated for specific user groups should be deemed "available to a substantial portion of the public" on the grounds that they compete with common carrier services.[180]

86. We conclude that, with the exception of the Business Radio Service, all Industrial and Land Transportation Services should be classified as private mobile radio services under Section 332(d)(3) of the Act. We agree with the view expressed by many commenters that because these services are limited under our rules to highly specialized uses for restricted classes of eligible users, they should be treated as not available to a substantial portion of the public for purposes of Section 332(d)(1). In addition, many of the licensees in these services operate systems solely for internal use and therefore do not meet the "for-profit" element of the CMRS definition.[181]

87. In the case of the Business Radio Service (BRS), we have determined that our eligibility rules are sufficiently broad to render this service effectively available to a substantial

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[176] The Industrial Radio Services consist of the Power, Petroleum, Forest Products, Video Production, Relay Press, Special Industrial, Business, Manufacturers, and Telephone Maintenance radio services. The Land Transportation Services are the Motor Carrier, Railroad, Taxicab, and Automobile Emergency radio services.

[177] *See, e.g.*, AAR Comments at 4-5; American Petroleum Comments at 4.

[178] *See, e.g.*, CTIA Comments at 7-8; McCaw Comments at 16; TDS Comments at 3-4.

[179] *See* ARINC Reply Comments at 2; American Petroleum Comments at 3-6; AAR Reply Comments at 4.

[180] USTA Comments at 5-6.

[181] Consistent with our decision concerning sale of excess capacity activities, however, we emphasize that Industrial and Land Transportation Services licensees will be treated as for-profit to the extent of any for-profit activity. Paras. 45-46, *supra*.

portion of the public.[182] Therefore, classification of BRS licensees will depend on whether they meet the other elements of the CMRS definition discussed in this Order. BRS licensees who offer for-profit interconnected service, as we have defined these terms, will be classified as CMRS providers. On the other hand, BRS licensees who operate internal use systems or do not offer interconnected service to system users will be classified as PMRS unless it is demonstrated that they are providing service that is functionally equivalent to CMRS.

d. Specialized Mobile Radio

88. In the *Notice*, we requested comment on how the elements of the CMRS definition should be applied to Specialized Mobile Radio (SMR) service. We stated our tentative belief that wide-area SMR service should be considered available to a "substantial portion of the public" and therefore classified as CMRS if the other elements of the definition are met. We pointed out that if we treat wide-area SMRs as available to a substantial portion of the public, under this approach, both existing wide-area SMR service and pending proposals for wide-area SMR service could be affected. We requested comment, however, on whether we should classify as private SMRs that do not offer wide-area service or do not employ frequency reuse on the grounds that such services are either not available to a "substantial portion of the public" or that they are not the "functional equivalent" of commercial mobile radio service. In addition, we sought comment on how we should classify wide-area licensees who provide non-interconnected service, do not serve a substantial portion of the public, or devote the majority of their system capacity to traditional dispatch service.

89. Many of the commenters believe that any wide-area SMR systems that provide interconnected service should be classified as CMRS.[183] Some commenters, such as E.F. Johnson, believe that only those wide-area systems employing frequency reuse should be classified as CMRS.[184] Commenters are also divided as to how we should classify small or traditional SMR systems. For example, CTIA and others contend that all SMR providers should be classified as CMRS in light of Congress's directives and economic analysis concerning their substitutability.[185] Other commenters, such as ITA, believe that the Commission should continue to classify as private smaller SMR systems that are licensed for a limited number of frequencies and offer service to a specialized class of customers.[186]

90. Under our interpretation of the statute, most SMR licensees automatically meet two of the elements of the CMRS definition. First, because all our rules define SMR licensees as "commercial" service providers,[187] they are by definition providing for-profit service under our interpretation of the CMRS definition. Second, we have concluded that the SMR end user eligibility criteria set forth in our rules[188] allow licensees to make service available to the public. With respect to the "interconnection" element of the definition, however, our rules allow but do not require SMRs to provide interconnected service to subscribers. We therefore

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[182] *See* para. 68, *supra.*

[183] *See, e.g.*, AMTA Comments at 14-15; DC PSC Comments at 8; NYNEX Comments at 14-15 & n.18.

[184] E.F. Johnson Comments at 9.

[185] *E.g.*, CTIA Comments at 15; Pacific Comments at 10; Mtel Comments at 10-11; Arch Comments at 8.

[186] ITA Comments at 5.

[187] Section 90.7 of the Commission's Rules, 47 C.F.R. § 90.7.

[188] Section 90.603(c) of the Commission's Rules, 47 C.F.R. § 90.603(c).

conclude that classification of all SMR systems turns on whether they do, in fact, provide interconnected service as defined by the statute. Licensees who provide interconnected service will be classified as CMRS providers, while those who do not will be classified as PMRS providers.[189]

91. This approach will result in CMRS classification for any wide-area SMR that intends to offer for-profit interconnected service, as we expect most such systems will do. This is consistent with Congress's goal and the views of most commenters that SMRs providing interconnected service on a competitive basis with cellular carriers should be regulated similarly to cellular carriers. At the same time, this approach will allow traditional SMR dispatch services to be classified as private to the extent that these systems are not offering interconnected service or do not have an interconnection request pending with the Commission. In this respect, we agree with those parties who argue that an individual dispatch-only SMR system does not fit within the definition of CMRS.

92. We emphasize, however, that any offering of interconnected service by a traditional SMR licensee will result in CMRS classification. Thus, our decision whether to classify SMRs as PMRS or CMRS will not turn on system capacity, frequency reuse, or other technology-dependent aspects of system operations. We agree with Telocator that "the agency has never relied on system capacity to ascertain regulatory status" and "to do so now could create disincentives to employ new capacity-enhancing technologies . . . ."[190] In addition, as concluded in an earlier section, our decision how to classify a service will not turn on the size of the geographic area served.[191]

93. Finally, we note that under our interpretation of "functional equivalence" discussed in paras. 79-80, *supra*, the possibility exists that an SMR system that does not fall within the CMRS definition could nevertheless be classified as CMRS based on a finding that it is functionally equivalent to CMRS. Because we are presuming all such SMR systems to be private, however, we conclude that there is no reason to reach this issue at this juncture. Should there be instances where parties contend that a presumptively private SMR licensee is providing the functional equivalent of CMRS, we believe that development of a record is required to overcome this presumption, and that such instances should be addressed on a case-by-case basis.

e. 220-222 MHz Private Land Mobile

94. In the 220-222 MHz band, we license systems with local or nationwide channels that can be used for commercial or non-commercial operations.[192] In the *Notice*, we requested comment addressing whether for-profit interconnected private land mobile services at 220 MHz should be classified as CMRS and non-commercial 220 MHz services classified as PMRS. Roamer asserts that technical limitations make the 220 MHz services unattractive for interconnected two-way voice communications, so they are not competitive with wide-area SMR offerings, cellular, or PCS. Roamer contends that 220 MHz services should therefore remain private except to the extent that we determine, on a case-by-case basis, that they compete with

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[189] As discussed in para. 55, *supra*, SMR licensees who do not offer interconnected service to their customers may use interconnected facilities for internal control purposes without affecting their regulatory status.

[190] Telocator Comments at 12.

[191] Para. 70, *supra*.

[192] *See* Part 90 of the Commission's Rules, Subpart T, 47 C.F.R. §§ 90.701-90.741.

wide-area SMR services.[193] Other commenters address 220 MHz systems indirectly; for example, AMTA argues that we should classify as private all two-way private carriers and all purely internal systems (this would include the non-commercial 220 MHz systems).[194]

95. Despite the arguments presented by Roamer, the key issue at 220 MHz is not whether the technology is attractive for voice messaging, but rather whether interconnected, for-profit service is in fact made available to the public. Eligibility for this service is extremely broad,[195] so we find that 220 MHz services are effectively made available to a substantial portion of the public. The technology permits licensees to offer interconnected services. Regulatory status therefore depends upon whether the licensee in fact makes available for-profit, interconnected service. Local 220 MHz channels may be used for commercial or non-commercial operations. If a local system licensee offers interconnected service that is for-profit, as we have interpreted that element of the statutory CMRS definition, then the service will be classified as CMRS. Services that are not interconnected or that are used for only non-commercial purposes, however, will be presumptively classified as PMRS, unless affirmative showings demonstrate that they are in fact the functional equivalent of CMRS. Nationwide 220 MHz channels are expressly designated for commercial or non-commercial use. The Rules provide for-profit use of the commercial channels, so the question in each case is whether interconnected service is offered. Offerings of interconnected service will be classified as CMRS, therefore, and non-interconnected services will be presumptively classified as PMRS unless contrary showings are made. The non-commercial nationwide channels are assigned for internal use of the licensee, which we have determined is not a for-profit use. Services on such channels therefore will be presumptively classified as PMRS unless a contrary showing is made. To the extent that these channels are used for any for-profit operations, however, and to the extent that interconnected service is offered, these channels will be reclassified as CMRS.

f. Private Paging

96. We requested comment on the regulatory treatment of private paging services under the statute. In so doing, we explained that private carrier paging (PCP) services are provided for profit and without any significant restriction regarding classes of customers; therefore, whether PCPs are classified as commercial mobile radio services would depend on whether they are providing interconnected service. In contrast, we conclude that paging services operated exclusively for the licensee's internal communications are not-for-profit.[196]

97. Commenters' views on the classification of PCPs are divided primarily based on whether they believe that "store-and-forward" service is a form of interconnected service within the meaning of the statute.[197] As discussed above, we have concluded that end user transmission or receipt of messages to or from the public switched network on a store-and-forward basis does constitute interconnected service.[198] Therefore, we conclude that PCPs should be classified as commercial mobile radio services. PCP services are generally provided for profit

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[193] Roamer Comments at 3-5.

[194] AMTA Comments at 14-16. *See* Section 90.771 of the Commission's Rules, 47 C.F.R. § 90.771 (non-commercial 220 MHz systems are designated for licensee's internal use).

[195] *See* Section 90.703 of the Commission's Rules, 47 C.F.R. § 90.703.

[196] *See* para. 44, *supra.*

[197] *See, e.g.*, Bell Atlantic Comments at 15; CTIA Comments at 15; McCaw Comments at 29-30; Motorola Comments at App. A; Nextel Comments at 16-17; NYNEX Comments at 15; Pagemart Comments at 8-10.

[198] *See* paras. 57-58, *supra.*

and without significant restrictions on eligibility. Also, given our determination regarding the types of arrangements that constitute interconnected service for purposes of Section 332(d)(1) of the Act, PCPs satisfy the criteria for classification as commercial mobile radio services. We believe that this classification is justified in part by the fact that there are no longer any real differences between private carrier and common carrier paging systems. As Nextel points out, "[b]oth offer interconnected service to enable subscribers to be reached by any user of the public switched network."[199] We do not extend CMRS classification, however, to private internal paging systems. Because these systems are not-for-profit and serve the internal communications needs of licensees rather than being publicly available, they will be presumptively classified as PMRS.

g. Automatic Vehicle Monitoring

98. Currently, Automatic Vehicle Monitoring (AVM) systems operate under interim rule provisions.[200] We sought comment in the *Notice* regarding the Commission's pending proposal to permit licensees of Automatic Vehicle Monitoring (AVM) systems, which operate by means of radio transmission to and from central control points, to provide location and monitoring service to Part 90 eligibles, individuals, and the Federal Government.[201] Metricom argues that Location and Monitoring Service (LMS) systems should be classified as CMRS because if the system operators make their service available to individuals then the services will be available to a substantial portion of the public.[202] Southwestern, an active AVM participant, states that AVM services should be classified as CMRS because they are likely to evolve into interconnected service over time.[203]

99. Under our interim rules, AVM service is licensed on a not-for-profit basis.[204] If this service is offered to third party users, the service is effectively available to a substantial portion of the public.[205] Under our proposal in the *LMS Notice,* AVM may be licensed on a for-profit basis and we propose to expand the eligibility to include individuals and the Federal Government.[206] At present, however, these systems do not offer interconnected service, nor are they likely to do so in the foreseeable future. Therefore, we will presumptively classify AVM systems as PMRS. Of course, should AVM systems develop interconnected service capability in the future, as Southwestern predicts, they will be subject to reclassification. Other AVM services, *i.e.*, those that are not wide-band offerings, include a broad range of services such as tag readers that may track trains and highway vehicles, automatically debit tolls from drivers' accounts, and perform numerous other intelligent location and monitoring services. Although these advanced services are provided for the benefit of the public, we anticipate that

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[199] Nextel Comments at 16.

[200] Section 90.239 of the Commission's Rules, 47 C.F.R. § 90.239.

[201] *See* Amendment of Part 90 of the Commission's Rules To Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, Notice of Proposed Rule Making, 8 FCC Rcd 2502 (1993) (*LMS Notice*).

[202] Metricom Comments at 5-6.

[203] Southwestern Comments at 8, 17.

[204] *LMS Notice,* 8 FCC Rcd at 2503. In 1992, however, the Private Radio Bureau granted Teletrac a waiver of the Commission's Rules to allow it to provide service on a private carrier basis, to serve individuals, and to locate objects other than vehicles. *Id.* at 2502-03.

[205] *See* para. 68, *supra.*

[206] *LMS Notice,* 8 FCC Rcd at 2503.

they generally will be offered through state and local government and other non-profit entities on a non-commercial basis, or used by licensees such as railroads for internal use, and therefore are not for-profit offerings. Accordingly, these services will be classified presumptively as PMRS.

2. *Existing Common Carrier Services*

a. Cellular and Other Services

(1) *Background and Pleadings*

100. The *Notice* requested comment on how existing common carrier services should be classified under revised Section 332 of the Act. We stated our view that existing common carrier services that provide interconnected radiotelephone service to the public will be classified as commercial mobile radio services. We emphasized that, depending on our decision as to whether store-and-forward paging constitutes interconnected service, however, common carrier systems that use store-and-forward could be subject to reclassification. In addition, we requested comment on whether some of the smaller common carrier systems in the Public Mobile Service could be reclassified as private if we conclude that low capacity systems do not serve the public, or a substantial portion of the public, for purposes of the CMRS definition in Section 332(d)(1).

101. The commenters generally agree that existing common carrier services, including cellular and paging, should be classified as commercial mobile radio services.[207] These parties agree that those common carrier services are for-profit, are interconnected services, and are made available to the public without restrictions. Some of the commenters believe, however, that there may be certain common carriers that may be more appropriately reclassified as private because they are not functionally equivalent in terms of market power and presence.[208]

(2) *Discussion*

102. We agree with the commenters who argue that most of the existing common carrier services satisfy the statutory requirement for classification as a commercial mobile radio service because they meet the three prongs of the statutory test. We agree with these parties that cellular service (Part 22, Subpart K) and the 800 MHz air-ground service (Part 22, Subpart M) are services that that fit within the three-pronged definition because they are provided for profit, are interconnected to the public switched network, and make interconnected service available to the public. The Public Land Mobile Service (Part 22, Subpart G) comprises several types of mobile and fixed operations, of which paging services, mobile telephone service (MTS), improved mobile telephone service (IMTS), trunked mobile service, and 454 MHz air-ground service meet the definition of commercial mobile radio service.[209] With respect to paging services that may use store-and-forward technology, we have determined that such technology should not prevent a service from being considered an interconnected service.[210] We also find that Offshore Radio

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[207] *See, e.g.*, CTIA Comments at 15; GTE Comments at 9; Motorola Comments at App. A; NYNEX Comments at 16.

[208] *See* AMTA Comments at 15; E.F. Johnson Comments at 9-10.

[209] The Public Land Mobile Service also contains provisions for authorization of 72-76 MHz fixed and point to multipoint stations which are fixed operations that operate in conjunction with mobile services.

[210] *See* paras. 57-58, *supra.*

Service (Part 22, Subpart L) satisfies the criteria for classification as CMRS.[211] This service is provided for profit, offers interconnected service, and contains no restriction on who may use the service. Moreover, Part 22 offshore radio service in not purely a fixed service as defined by our Rules. Accordingly, we classify these existing common carrier mobile services as commercial mobile radio services. Finally, we find that the Rural Radio Service, including BETRS, is a fixed service and is not affected by this proceeding.

b. Dispatch

(1) *Background and Pleadings*

103. We requested comment on whether we should amend our rules to allow existing common carriers who are classified as commercial mobile radio services to provide dispatch service. Under Section 332(c)(2) of the Act, Congress has given the Commission discretion to terminate the current dispatch prohibition in whole or in part. Thus, we sought comments on (1) whether there are any technical justifications for continuing the prohibition; (2) whether eliminating the dispatch prohibition would provide carriers with greater flexibility to meet their customer needs; and (3) whether eliminating the prohibition would promote increased competition in the dispatch marketplace and lower costs to subscribers.

104. While most commenters favor eliminating the current prohibition on dispatch,[212] a number of commenters raise competitive concerns with such a proposal.[213] Those who favor elimination of the dispatch prohibition argue that there are no technical justifications for the prohibition and that allowing CMRS providers to offer dispatch service will provide consumers with expanded choices.[214] Parties on the other side of this issue argue that while eventual repeal of the dispatch ban may be justified, immediate repeal could enable CMRS providers to exert market power against traditional SMR systems that now offer dispatch.[215] In addition, AMSC requests that the Commission clarify that mobile satellite service (MSS) systems are permitted to provide dispatch service.[216]

(2) *Discussion*

105. We have concluded that the record established in this proceeding has not provided us with sufficient data to sustain an informed judgment regarding the effects that removal of the dispatch service ban may have in the dispatch marketplace. Therefore, we have decided to seek further comment on this matter in the context of an upcoming proceeding in which we plan to examine our prohibition against the licensing of wireline telephone carriers in the SMR service. This will enable us to establish a more definitive record so we can better evaluate this issue. We note, however, the following points. First, in examining the dispatch service issue, we will continue to be guided by our objective to promote and protect competition, not specific competitors. Second, AMSC MSS has been authorized to provide "a two-way voice dispatch

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[211] Offshore Radio Service Stations are authorized to offer and provide common carrier radio telecommunications services for hire to subscribers on structures (also, airborne stations not exceeding 1000 feet above ground and boats) in the offshore coastal waters of the Gulf of Mexico. *See* Sections 22.1000-22.1008 of the Commission's Rules, 47 C.F.R. §§ 22.1000-22.1008.

[212] *See, e.g.*, MCI Comments at 6-7; NYNEX Comments at 16; Telocator Comments at 16-17.

[213] *See, e.g.*, E.F. Johnson Comments at 10.

[214] *See, e.g.*, Bell Atlantic Comments at 17-19; Telocator Comments at 16-17.

[215] *See, e.g.*, AMTA Comments at 21-22.

[216] AMSC Comments at 6-7; AMSC Reply Comments at 1-2.

service between a user terminal and a base station."[217] This Order does not alter AMSC's current authorization to provide service.

c. Satellite Services

(1) *Background and Pleadings*

106. We explained in the *Notice* that mobile services using the system capacity of a satellite licensee fall within Section 3(n) of the Communications Act. Citing *Martin Marietta,*[218] we indicated that the Commission may authorize a domestic satellite licensee to offer system capacity for the provision of mobile service on a non-common carriage basis absent a showing that it would not be in the public interest. Because Section 332(c)(5) did not prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to CMRS providers shall be treated as common carriage, we tentatively concluded that we should continue our existing procedures for making this determination.[219] Furthermore, we stated that if the satellite system licensee opts to provide commercial mobile radio service directly to end users, it shall be treated as a common carrier. Similarly, provision of commercial mobile radio service to end users by earth station licensees or providers who resell space segment capacity would be treated as common carrier service. We sought comments on this analysis.

107. Starsys, Motorola, and NYNEX agree with our proposal to continue to authorize domestic mobile satellite service licensees to provide service on a non-common carrier basis if the public interest is served.[220] In addition, AMSC agrees with our proposal to require this service to be classified as CMRS to the extent that the services are provided to end users.[221] AMSC requests, however, that if the Commission decides to regulate some mobile satellite licensees as non-common carriers in the provision of space segment, all licensees of similar services, such as AMSC, should be regulated the same.[222] TRW and Reed Smith argue that resellers of satellite capacity should not be regulated as CMRS unless they provide service directly to end users, regardless of the regulatory status of the licensee of the underlying satellite

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[217] Amendment of Parts 2, 22 and 25 of the Commission's Rules To Allocate Spectrum for and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, GEN Docket No. 84-1234, Memorandum Opinion, Order and Authorization, 4 FCC Rcd 6041, 6046-48 (1989)(*AMSC Authorization Order*).

[218] Martin Marietta Communications Systems, Memorandum Opinion and Order, 60 Rad.Reg. (P&F) 2d 779 (1986)(*Martin Marietta*).

[219] The Commission must make this determination by looking at an array of public interest considerations (*e.g.*, the types of services being offered and the number of licensees being authorized). *See, e.g.*, Amendment of Parts 2, 22 and 25 of the Commission's Rules To Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, GEN Docket No. 84-1234, Second Report and Order, 2 FCC Rcd 485, 490 (1987); Amendment to the Commission's Rules To Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service, GEN Docket No. 84-689, Second Report and Order, 104 FCC 2d 650, 665-66 (1986)(*RDSS Order*).

[220] Motorola Comments at 13-15; NYNEX Comments at 17; Starsys Comments at 2.

[221] AMSC Comments at 5.

[222] AMSC Reply Comments at 3-4.

system.[223] TRW also argues that some mobile satellite services — *e.g.*, radiolocation services for truck fleets or data service networks for a company's employees — may not be CMRS because they may be offered on a non-interconnected basis to a limited population.[224]

(2) *Discussion*

108. The Commission will continue to use its existing procedures to determine whether "the provision of space segment capacity by satellite systems to providers of commercial mobile service shall be treated as common carriage."[225] We will extend this treatment to any entity that sells or leases space segment capacity, to the extent that they are not providing CMRS directly to end users. Consistent with Section 332(c)(1)(A) of the statute, however, the provision of both space and earth segment capacity either by mobile satellite system licensees providing service through, for example, their own licensed earth stations, or by earth station licensee resellers, directly to users of CMRS shall be treated as common carriage.[226] Thus, each mobile satellite service must be evaluated, consistent with the approach outlined in this decision, to determine whether the service offering is CMRS or PMRS.

109. At present, there are three mobile satellite services authorized by this Commission: geostationary mobile satellite service (MSS);[227] non-voice, non-geostationary mobile satellite service (NVNG MSS),[228] and radiodetermination satellite service (RDSS).[229] MSS is regulated as a common carrier service, RDSS is regulated as a private service, and NVNG MSS space station licensees are not required to be common carriers in providing system access to CMRS providers. Thus, under our existing procedures, we have already provided a regulatory framework under which RDSS and NVNG system licensees and other entities may provide system access to CMRS providers on a non-common carrier basis. We believe that each of these services may be offered to end users as CMRS. For example, these services probably will be offered for-profit and to the public; however, they may not be interconnected to the public switched network in all cases (*e.g.*, the back-haul to the customer may be through a private fixed-satellite network). Thus, to the extent a space station licensee or other entity provides to end users a service that meets the elements of the CMRS definition discussed in this Order or is the functional equivalent of CMRS, we will regulate the provision of that service by the licensee or other entity as common carriage. We decline on this record, however, to change the regulatory classification of AMSC, the sole domestic MSS space station licensee. AMSC is authorized as a provider of space segment capacity directly to end users through its own earth

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[223] Reed Smith Comments at 5; TRW Reply Comments at 13.

[224] TRW Comments at 16-21.

[225] Comsat has been authorized to offer system capacity on Inmarsat satellites for the provision of mobile satellite service. It has also been authorized to offer Inmarsat-based mobile satellite service directly to end users. Comsat has been treated as a common carrier in both instances. 47 U.S.C. § 741. The new Section 332(c)(4) of the Communications Act provides that Section 332(c) does not alter or affect this treatment.

[226] *See* Conference Report at 494.

[227] *AMSC Authorization Order*.

[228] Amendment of the Commission's Rules To Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile Satellite Service, CC Docket No. 92-76, Report and Order, 8 FCC Rcd 8450 (1993).

[229] *See RDSS Order*.

stations.[230] AMSC has not demonstrated why, under our existing procedures, it should not continue to be regulated as a common carrier.[231] In another rule making proceeding, the Commission has proposed that low-Earth orbiting satellites be used to provide MSS in the 1.6 and 2.4 GHz bands.[232] We will determine in that proceeding the regulatory status of the provision of space segment capacity in the 1.6 and 2.4 GHz bands to CMRS providers.[233] In addition, based on the Section 332 criteria outlined in this decision, we will determine whether a satellite licensee's provision of space segment capacity to end users shall be treated as CMRS or PMRS. Regardless of the nature of this determination, however, it is important to note that we have sought comment in the *MSS Above 1 GHz Notice* regarding whether there are "public interest reasons to impose a legal compulsion upon MSS Above 1 GHz space station operators to serve the public indifferently, even if an MSS Above 1 GHz offering does not fall within the definition of CMRS."[234]

3. *Commercial and Private Service on Common Frequencies*

a. Background and Pleadings

110. Based on the assumption that some existing private land mobile services are reclassified as commercial mobile radio services, we stated in the *Notice* that it would be necessary to address how commercial and private mobile radio services would co-exist on common frequencies. We stated our belief that any attempt to separate our existing private land mobile bands into separate allocations for commercial and private services would be impractical and unnecessary. Instead, we indicated that we prefer to allow licensees on existing land mobile frequencies the flexibility to provide either commercial or private service as defined by our rules.

111. One approach we proposed would allow licensees the option to provide both commercial and private service under a single license. Under this alternative, we would impose the appropriate classification and regulations on each type of service provided. Another approach we proposed would be to classify licensees as commercial or private mobile radio service providers based on their primary use of the spectrum. We sought comments on the implications of each of these proposals as well as other alternatives to resolve this issue.

112. AMTA warns that any bifurcated regulatory approach we adopt may have to be revisited if it impedes industry growth or uniquely disadvantages certain classes of users.[235]

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[230] American Mobile Satellite Corp., File No. 420-DSE-P/L-90, Order and Authorization, 7 FCC Rcd 942 (1992).

[231] The Commission has also authorized IDB to provide Inmarsat-based mobile satellite service directly to end users. IDB requested, and was granted, common carrier status. We find no basis on this record to modify IDB's common carrier status.

[232] Amendment of the Commission's Rules To Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5 / 2483.5-2500 MHz Frequency Bands, CC Docket No. 92-166, Notice of Proposed Rule Making, FCC 94-11 (adopted Jan. 19, 1994) (*MSS Above 1 GHz Notice*).

[233] Using our existing procedures, the Commission will make its determination based on the criteria of the *NARUC I* test discussed in the *MSS Above 1 GHz Notice*. *Id.* at para. 80.

[234] *Id.* at para. 81.

[235] AMTA Comments at 16.

E.F. Johnson asserts that the Commission need only establish compatible co-channel protection criteria between the services to ensure co-existence.[236]

b. Discussion

113. As a result of our other decisions in this Order, some, but not all, licensees operating on frequency bands currently allocated to Part 90 services will be reclassified as CMRS providers. We will not be able to determine the regulatory status of licensees by the assigned frequency bands as in the past. Rather, it appears inevitable that both commercial and private mobile radio services will coexist on the same frequency bands. Thus, we agree with E.F. Johnson that it is not practical to establish a regulatory structure that is frequency specific.

114. Based on our objective of ensuring that like mobile services are regulated similarly as a means of ensuring regulatory symmetry, we will be amending our rules in a future rule making in this proceeding to reconcile significantly disparate technical, operational and procedural regulations. Our decision to bring similar offerings under the same regulatory classification and rules should allow all mobile service providers the flexibility to offer competitive service.

115. Finally, we favor issuing a single license to mobile service providers offering both commercial and private services on the same frequency. In particular, we will adopt the same licensing scheme for existing mobile services as we are establishing for PCS.[237] As we discuss in Part III.D, paras. 116-123, *infra*, PCS licensees that offer both commercial and private services will be issued a single CMRS license, but may seek authority to dedicate a portion of their assigned spectrum to PMRS.

D. Regulatory Classification of Personal Communications Services

1. *Background and Pleadings*

116. In the *Notice* we sought comment on what regulatory approach ought to be taken with respect to personal communications services (PCS). In particular, we asked commenters to address whether all PCS should be deemed to be commercial mobile radio service, or whether some PCS offerings might be identified as private mobile radio services. We also proposed that, if PCS is defined to include both commercial and private applications, then PCS licensees should be allowed to choose the type of service they would provide. In relation to this "self-designation" option, the *Notice* also sought comment on whether the option should require that licensees offer one type of service on a primary basis, limiting their offering of the other type on a secondary basis, or in the alternative, whether we ought to allow licensees to offer both commercial and private mobile radio services on a "co-primary" basis. Finally, we asked commenters to evaluate the practical licensing consequences that would flow from adoption of the "self-designation" option.

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[236] E.F. Johnson Comments at 9.

[237] We plan to issue a Notice of Proposed Rule Making in the near future to address a range of licensing issues related to the actions we take in this Order. Procedural and technical rules relating to the provision of commercial and private services by carriers on the same frequency will be considered in that proceeding. *See* Part IV.C, para. 285, *infra*.

117. Many commenters and reply commenters favor treatment of all PCS services as exclusively, or at least "presumptively," commercial mobile radio service offerings.[238] Several other commenters maintain, however, that all PCS licensees should be allowed to "self-designate," by means of licensee choice, whether they are to provide commercial or private mobile radio service offerings.[239] A few commenters and reply commenters contend that some portion of PCS spectrum should be reserved for private mobile radio service use.[240] Mtel argues, however, that "it is the nature of the services provided, and not any regulatory compulsion or self-designation, that should dictate PCS classification."[241] Lastly, Time Warner maintains that all PCS should be regulated as private mobile radio service.[242]

2. *Discussion*

118. In deciding what regulatory approach to adopt for PCS we believe that it is imperative first to emphasize the goals for this service that were established in our PCS proceeding and by Congress in adopting the Budget Act. In the *PCS Notice* we proposed to achieve four basic goals in establishing PCS, namely: (1) universality; (2) speed of deployment; (3) diversity of services; and (4) competitive delivery.[243] Consequently, in our final decisions in both the broadband and narrowband contexts, we decided to define PCS broadly, as:[244]

> [r]adio communications that encompass mobile and ancillary fixed communication services that provide services to individuals and businesses and can be integrated with a variety of competing networks.

In adopting this definition for broadband and narrowband PCS, our goal was to ensure that PCS would include the widest possible variety of services for individuals and businesses, and that PCS providers would be able to employ the "maximum degree of flexibility" in meeting the communications requirements of various users.[245] We also believe that Congress's intent in adopting the Budget Act was to maximize the competitiveness and public availability of PCS

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[238] *See, e.g.*, AMTA Comments at 18; Bell Atlantic Comments at 16; CTIA Comments at 17; DC PSC Comments at 10; NARUC Comments at 9-10; Nextel Comments at 17; Pacific Comments at 13-14; Southwestern Comments at 17-18; USTA Comments at 9-10; Vanguard Comments at 13-14; Pacific Reply Comments at 4-5; PA PUC Reply Comments at 10-11.

[239] *See, e.g.*, AMT/DSST Comments at 5; Ameritech Comments at 2-4; California Comments at 2-4; CTIA Comments at 17-18; CTP Comments at 3; GTE Comments at 12-13; Motorola Comments at 11-12; NABER Comments at 13-14; NTCA Comments at 4; Pagemart Comments at 17-18; Rochester Comments at 6 n.11; TDS Comments at 17-18; Telocator Comments at 17-18; TRW Comments at 26-27; *but see* MCI Reply Comments at 6; Rural Cellular Reply Comments at 5-8.

[240] *See, e.g.*, New York Comments at 9; Southwestern Comments at 18; UTC Comments at 17-18; UTC Reply Comments at 19-20.

[241] Mtel Comments at 11.

[242] Time Warner Comments at 4.

[243] *PCS Notice*, 7 FCC Rcd at 5679 (para. 6).

[244] *Broadband PCS Order*, 8 FCC Rcd 7700, 7710-13 (paras. 19-24). *See Narrowband PCS Order*, 8 FCC Rcd 7162, 7163-64 (paras. 9-14).

[245] *Broadband PCS Order*, 8 FCC Rcd at 7712 (para. 23); *Narrowband PCS Order*, 8 FCC Rcd at 7164 (para. 13).

spectrum.[246] We conclude that, for the reasons discussed in the following paragraphs, designating broadband and narrowband PCS as presumptively CMRS will advance all of our goals and Congress's intent in enacting the Budget Act.

119. We agree with Bell Atlantic's suggestion that we establish a "presumption" that PCS will be classified as CMRS, allowing each PCS provider to make a showing that one or more of its services are private. We believe that the presumption approach is warranted because we have defined PCS to be broadly available to "individuals and businesses" and capable of interoperability so that it "can be integrated with a variety of competing networks."[247] PMRS services do not meet these criteria because they are not available to the public (or a substantial portion of the public) or are not interconnected to the public switched network. Therefore, a presumption that PCS should be CMRS fits our general definition of the service. All PCS spectrum will be presumed to be licensed as CMRS. An applicant or licensee proposing to use any PCS spectrum to offer service on a PMRS basis may overcome the CMRS presumption. To do so, the applicant or licensee must make a showing that must include a certification indicating that the licensee plans to offer PCS on a private basis. The certification must include a description of the proposed service sufficient to demonstrate that it is *not* within the CMRS definition. As in other licensing activities, we intend to rely on applicants' representations, and any interested party seeking to show that a licensee's request to offer PCS on a private basis does not defeat the CMRS presumption must present specific allegations of fact supported by an affidavit of a person or persons with personal knowledge.[248] If a PCS applicant who is authorized to provide only PMRS service actually provides CMRS service under that license, it will be subject to appropriate enforcement action.[249]

120. We agree with commenters that treating PCS as presumptively CMRS will advance the public interest and the underlying intent of the Budget Act. First, CMRS status for PCS will advance our goal of universality for PCS. Certain Title II obligations ensuring non-discriminatory access and fair pricing, and procedures for filing complaints against practices violating these obligations, will contribute to the universal availability of PCS because such regulations place an obligation on PCS licensees to make their service available to the public at fair prices, and the complaint process under Section 208 is available to ensure that these obligations are met.[250] No similar Title II obligations would apply if we were to designate PCS as private carriage. We also conclude that commercial mobile radio service status is consistent with our goal of achieving

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[246] *See* Communications Act, § 8(g), 47 U.S.C. § 158(g). Furthermore, our authority to issue licenses by auction under the Budget Act was conditioned on the completion of this rule making proceeding with respect to classification of PCS. *See* Communications Act, §§ 309(j)(10)(A)(iv), 332(c)(1)(D), 47 U.S.C. §§ 309(j)(10)(A)(iv), 332(c)(1)(D); *see also Auction Notice*, 8 FCC Rcd at 7655 n.110 (para. 116) (principal use of PCS spectrum is expected to involve service offerings rendered in exchange for compensation).

[247] *Broadband PCS Order*, 8 FCC Rcd at 7712 (para. 23).

[248] *See* Communications Act, § 309(d)(1), 47 U.S.C. § 309(d)(1). Because of the CMRS presumption, all PCS applications and modifications will be placed on public notice for 30 days. *See id.*, § 309(b). *See* Section 20.9(b) of the Commission's Rules, as adopted in this Order, for the procedures an applicant or licensee must follow to offer PCS as a PMRS.

[249] *See, e.g.*, Communications Act, §§ 312(a), 503(b), 47 U.S.C. §§ 312(a), 503(b).

[250] *See, e.g.*, Communications Act, §§ 201, 202, 208, 47 U.S.C. §§ 201, 202, 208 (providing for, respectively: service and interconnection upon reasonable request and terms; no unjust or unreasonable discrimination; complaint procedures to exact forfeitures for violation of these obligations); *see also Notice*, 8 FCC Rcd at 7999-8001 (paras. 56-68).

speedy deployment of PCS. We have set certain construction requirements for PCS licensees in order to ensure such quick deployment of PCS. Within their ten-year license terms, broadband PCS licensees must serve one-third of the population within their market areas within five years, two-thirds within seven years, and 90 percent within ten years after being licensed.[251] In the case of narrowband PCS, licensees will be required to cover 37.5 percent of the population of the applicable service area within five years, and 75 percent of the population within ten years.[252]

121. We believe that designation of PCS as presumptively CMRS is consistent with the strict build-out requirements we have established to ensure quick deployment of the service. The plain meaning of the words "offer service to . . . the population" in the broadband PCS build-out requirements is that broadband PCS licensees must be in a position to serve the stated percentages of population, upon reasonable request, in their service areas within the specified time. We agree with commenters who also maintain that it would be difficult for broadband PCS licensees to meet these build-out requirements on a private basis, since the requirements call for service of large percentages of population. Because we have concluded that Section 332 requires PMRS to be limited to service available to only a limited group of users in any given service area, or restricted to non-interconnected service, it would be extremely difficult for licensees to meet our PCS build-out requirements on a private basis.

122. CMRS status for PCS will not hinder our goal of promoting diverse services. The statute allows us to adopt a flexible regulatory scheme to treat certain CMRS in a streamlined fashion, thereby cultivating diversity among services.[253] Nor will regulating all PCS as presumptively CMRS necessarily deter diverse service offerings because, in the past, we have allocated spectrum for common carriage use without requiring that it be operated only under any one particular technical set of parameters.[254]

123. Also, common carriage regulation of PCS will foster competitive delivery. Congress has given us the mandate to examine the competitive aspects of commercial mobile radio service markets on an ongoing basis so that we can assure competitive conditions exist among PCS

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[251] *Broadband PCS Order*, 8 FCC Rcd at 7753-54 (paras. 132-134).

[252] *Narrowband PCS Reconsideration Order* at para. 32.

[253] In explaining the provisions of Section 332(c)(1)(A) allowing forbearance for some commercial mobile service providers, the Conference Report explains that:

> the purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier.

Conference Report at 491.

[254] *See, e.g.*, Amendment of Parts 2 and 22 of the Commission's Rules To Allocate Spectrum in the 928-941 MHz Band and To Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, First Report and Order, 89 FCC 2d 1337, 1343 (1982) (deciding "not to earmark common carrier frequencies for any specific use").

licensees and in relation to rival services.[255] CMRS status for PCS will further accomplish Congress's intent in enacting the Budget Act by establishing regulatory symmetry among mobile service providers. In addition, statutory forbearance from many aspects of Title II common carriage regulation will enhance the efficiency and public value of PCS spectrum, advancing the nation's network infrastructure into the forefront of state-of-the-art wireless telecommunications technologies. Moreover, our rules will allow PCS providers to provide private PCS service if they demonstrate a reasonable basis for overcoming the CMRS presumption.[256] We therefore conclude that presumptive commercial mobile radio service status for PCS will advance the public interest.

E. Forbearance from Title II Regulation

1. *Statutory Test*

124. Section 332(c)(1)(A) provides that the Commission may determine that any provision of Title II may be specified as "inapplicable to [any] service or person" otherwise treated as a common carrier.[257] The Conference Report states that "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section."[258]

125. Section 332(c)(1)(A) also requires that before forbearing from applying any section of Title II the Commission must find that each of the following conditions applies:[259]

(1) Enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory.

(2) Enforcement of such provision is not necessary for the protection of consumers.

(3) Specifying such provision is consistent with the public interest.

As we discussed in the Notice, as part of evaluating the "public interest" described in Section 332(c)(1)(A)(iii), Section 332(c)(1)(C) mandates that the Commission consider "whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile service. . . ."[260] For PCS, Section 332(c)(1)(D) specifically requires the Commission to make these determinations within 180 days of enactment. While the public interest evaluation requires the Commission to look at market conditions, the statute permits us to consider other factors in deciding whether to forbear from regulating under any provision of Title II. In the Notice we

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[255] Under the Communications Act, §§ 332(c)(1)(A)-332(c)(1)(C), 47 U.S.C. §§ 332(c)(1)(A)-332(c)(1)(C), the Commission may review competitive market conditions and adopt a flexible regulatory scheme forbearing from certain regulations in order to foster competition. *See Notice*, 8 FCC Rcd at 7998-99 (paras. 53-59); *see also* Part III.E, paras. 124-219, *infra*.

[256] See para. 119, *supra*.

[257] Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[258] Conference Report at 491.

[259] Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[260] *Id.*, § 332(c)(1)(C), 47 U.S.C. § 332(c)(1)(C).

sought comment on what factors the Commission should consider when performing the analyses pursuant to this test.

2. *Competition in the Commercial Mobile Radio Services Marketplace*

a. Background and Pleadings

126. In the *Notice*, we tentatively concluded that the mobile services marketplace was sufficiently competitive to justify forbearance from many sections of Title II.[261] Since the third prong requires the Commission to determine the effect of forbearance on competition in the CMRS marketplace, we focus on the competitive nature of the CMRS marketplace first.

127. CTIA, Motorola, and other commenters contend that the CMRS marketplace is competitive, and becoming increasingly more so, with as many as seven PCS licensees and SMR and enhanced SMR providers joining the two cellular licensees and resellers currently operating in each market.[262] Bell Atlantic and McCaw argue that in the cellular market, the presence of two facilities-based providers, in addition to resellers, assures competitive conditions that prevent any one competitor from possessing the ability and incentive to engage in anti-competitive practices.[263] McCaw also asserts that cellular carriers lack market power.[264] Bell Atlantic and GTE contend that the Commission has long recognized that the cellular marketplace is subject to vigorous competition on both a facilities and resale basis.[265] Motorola and Mtel further argue that the paging industry is even more competitive, with 80 private and common carrier channels available in the 900 MHz band alone, supporting several thousand systems across the nation.[266]

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[261] The *Notice* did not propose to address the question of forbearance for international CMRS and we do not propose such action here. *See* note 369, *infra*.

[262] CTIA Comments at 33; Motorola Comments at 17-18. *See also* AMSC Comments at 1; Arch Comments at 11; BellSouth Comments at 26; Century Comments at 5-6; Comcast Comments at 12; GTE Comments at 15; Cox Comments at 7; McCaw Comments at 8; Nextel Comments at 21; Sprint Comments at 12; Telocator Comments at 19-20, *citing* CTIA, "The U.S. Cellular Telecommunications Industry: An Overview Analysis of Competition and Operating Economics" at 12-16 (Aug. 26, 1992).

[263] Bell Atlantic Comments at 21-24; McCaw Comments at 7-8. *See also* Southwestern Comments at 27.

[264] McCaw Comments at 9.

[265] Bell Atlantic Comments at 23-24, *citing* Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, Notice of Proposed Rule Making, 6 FCC Rcd 1732, 1733 (1991); Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, Report and Order, 7 FCC Rcd 4028, 4029 (1992) *(Cellular CPE Bundling Order)*; GTE Comments at 14-15, *citing Cellular CPE Bundling Order*.

[266] Motorola Comments at 18; Mtel Comments at 15 (asserting that paging is competitive, arguing that the Commission established three common carrier network paging carriers based upon a determination that such licensing was sufficient both to serve existing demand and to provide genuine competition), *citing* Amendments of Parts 2 and 22 of the Commission's Rules To Allocate Spectrum in the 928-941 MHz Band and To Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, General Docket No. 80-183, Memorandum Opinion and Order on Reconsideration (Part 2), 93 FCC 2d 908 (1983). *See also* Telocator Comments at 19.

128. New Par, citing a recent economic study, notes that cellular rates have declined in real terms since cellular's inception.[267] Pagenet contends that the number of paging subscribers has increased, and the price of pagers and paging services has declined, and that these are clear indications of the competition present in the paging market.[268] CTIA asserts that the CMRS marketplace is competitive and argues that it is well-documented that CMRS providers lack market power, *i.e.*, the ability to raise price by restricting output.[269]

129. Bell Atlantic cites to another Commission rule making in which the Commission concluded that "[i]t appears that facilities-based carriers are competing on the basis of market share, technology, service offering, and service price."[270] Mtel, Pagenet, and Telocator note that the Commission has already found other common carrier mobile licensees, which are primarily engaged in the provision of paging service, to be non-dominant in their provision of interstate services.[271] In-Flight notes that the Commission found, in establishing rules for 800 MHz air-ground service, that each air-ground service provider would face substantial competition from other air-ground service providers.[272]

130. Bell Atlantic argues that the cellular industry has experienced rapid growth, nationwide expansion of coverage, declining prices, and introduction of new technologies and services, all while cellular carriers did not file tariffs.[273] Bell Atlantic points out that the vast majority of states have decided not to regulate cellular service and many states which at one time imposed rate regulation have abandoned it based on the competitiveness of the cellular markets in their states. This, asserts Bell Atlantic, supports the Commission's tentative finding that the tariffing requirement is "not necessary."[274]

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[267] New Par Comments at 9, *citing* Cellular Competition: The Charles River Study (1992). This report found a 19 percent decline (adjusted for inflation) in rates since 1983 and a 44 percent decline in accounting and operating a cellular telephone over the same period.

[268] Pagenet Comments at 20-21, *citing* EMCI, The State of the US Paging Industry — Subscriber Growth, End-User and Carrier Trends: 1990, at 33; EMCI, The State of the US Paging Industry — Subscriber Growth, End-User and Carrier Trends: 1993, at 1, 9.

[269] CTIA Comments at 34, *citing* J. Haring & C. Jackson, Strategic Policy Research, "Errors in Hazlett's Analysis of Cellular Rents," at 1 (Sept. 10, 1993) (Haring & Jackson) ("rents in cellular telephony can only reflect scarcity of spectrum rather than market power"); Metro Mobile v. New Vector, 892 F.2d 62 (9th Cir. 1989) (cellular market is competitive).

[270] Bell Atlantic Comments at 23, *quoting Cellular CPE Bundling Order*, 7 FCC Rcd at 4029.

[271] Mtel Comments at 14; Pagenet Comments at 18-20 (paging industry is vigorously competitive, *citing* R. Ridley, 1993 Survey of Mobile Radio Paging Operators, Communications, Sept. 1993 (Ridley Survey), at 20); Telocator Comments at 19; Telocator Reply Comments at 11. *See also* Bell Atlantic Comments at 22; Motorola Comments at 18; PacTel Paging Comments at 11.

[272] In-Flight Comments at 3, *citing* Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 Bands, GEN Docket No. 88-96, Report and Order, 5 FCC Rcd 3861, 3865 (1990), *recon. denied*, 6 FCC Rcd 4582 (1991).

[273] Bell Atlantic Comments at 23.

[274] *Id.* at 24-25.

131. NCRA argues that the public does not have access to a competitive cellular market.[275] The PA PUC contends that it cannot support the Commission's finding that there is sufficient competition in the commercial mobile services marketplace.[276] NCRA contends that the Commission has not changed its classification of facilities-based cellular providers as dominant carriers. NCRA claims that cellular's dominant status, coupled with the Commission's obligation to perform a detailed review of competitive market conditions, make any conclusions about the cellular market without collecting the necessary data premature.[277] New York and PA PUC also believe that a decision to support forbearance, in consideration of the current market conditions, would be premature.[278]

132. California contends that it and consumer groups have determined that competition does not exist in the California market.[279] California further asserts that in the California cellular market many cellular operators have an ownership interest in the other competitor in the same market, and that in many cases, cellular licensees that compete in one market may be business partners in another, contributing to the market problems. California argues that there is not adequate competition in the cellular marketplace in California to ensure just, reasonable, and non-discriminatory rates. California contends that it would be premature for the Commission to forbear from regulating the rates of CMRS.[280]

133. Bell Atlantic, CTIA, and Southwestern assert that NCRA's comments repeat the same claims it presented to the Commission in the cellular resale proceeding, which the Commission rejected.[281] PacTel contends that NCRA's claims regarding competition in the cellular market are incorrect.[282] Bell Atlantic argues that wholesale rate regulation has in fact increased rates.[283] Finally, Bell Atlantic and CTIA contend that NCRA, at best, provides flawed economic support for its claims.[284]

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[275] NCRA Comments at 15-16.

[276] PA PUC Reply Comments at 14.

[277] NCRA Comments at 15-16.

[278] New York Comments at 10-11; PA PUC Reply Comments at 15.

[279] California Comments at 6.

[280] California Comments at 6-8 (at a recent legislative hearing the Public Utilities Commission of the State of California presented evidence showing that rates that were set nearly nine years ago have not fallen). *See also* MMR Reply Comments at 6 (urging the Commission not to forbear from tariff regulation for commercial mobile service providers affiliated with dominant carriers).

[281] Bell Atlantic Reply Comments at 7; CTIA Reply Comments at 8; Southwestern Reply Comments at 5-7. *See also* GTE Reply Comments at 10; Pacific Reply Comments at 8; Rochester Reply Comments at 5. Bell Atlantic asserts that the Commission's action was affirmed in sweeping language by the D.C. Circuit, which held that NCRA's "evidence [of lack of competition] falls far short" and was "thin." Bell Atlantic Reply Comments at 7, *citing* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106 (D.C. Cir. 1992).

[282] PacTel Reply Comments at 2-3. *See also* Telocator Reply Comments at 11-12.

[283] Bell Atlantic Reply Comments at 8.

[284] *Id.* at 8-9; CTIA Reply Comments at 7-8. *See also* McCaw Reply Comments at 12-13. CTIA claims that NCRA selectively quotes from a recent Government Accounting Office report that states that the GAO is unable to determine whether the cellular market is competitive. CTIA also notes that NCRA's

134. CTIA, NYNEX, and Bell Atlantic dispute the claims of California, which they argue are based only on the California market.[285] Moreover, argues CTIA, economic studies show that cellular rates are approximately 5 percent to 16 percent higher in those states that regulate cellular prices. Therefore, claims CTIA, regulation and not the lack of competition may explain the higher rates that are being complained of.[286] PacTel contends that in fact cellular rates are now lower than in the past, both in absolute terms and as adjusted for inflation.[287]

b. Discussion

135. We reached the tentative conclusion in the *Notice* that the level of competition in the CMRS marketplace is sufficient to support a decision to exercise our forbearance authority as established by Congress in the Budget Act. Based upon our review of the comments and our further examination of the issues presented, we now have made the following principal findings.

136. First, we conclude that the most prudent approach for us to follow in reaching decisions regarding forbearance in this Order must involve an examination of the prevailing climate of competition with respect to each of the various mobile services comprising the CMRS marketplace. A threshold question is whether we should treat CMRS as a single market for purposes of exercising our forbearance authority. There is disagreement in the record regarding whether commercial mobile radio services are distinct or whether they can be blended together into a single CMRS market. We conclude that, for purposes of evaluating the level of competition in the CMRS marketplace, the record does not support a finding that all services should be treated as a single market. Thus, we will proceed with an analysis that focuses on each of the various commercial mobile radio services currently offered, and about to be offered, keeping in mind that our doing so is not intended to prejudge the issue of whether, and to what extent, there is competition among these various services.

137. Second, we conclude that the record supports a finding that all CMRS service providers, other than cellular service licensees, currently lack market power. This finding, which is presented in greater detail with respect to each of the services in succeeding paragraphs, supports our conclusion that consumer interests will not be adversely affected, that economic growth will be stimulated and the general economy will benefit, and that the public interest thus will be served, by our forbearing from certain requirements in Title II of the Act that otherwise would be placed upon CMRS providers.

138. Third, in the case of cellular service, the Commission has previously acknowledged that, while competition in the provision of cellular services exists, the record does not support a conclusion that cellular services are fully competitive. We conclude here, however, that the current state of competition regarding cellular services does not preclude our exercise of forbearance authority. Although we discuss the basis for this conclusion in greater detail in our subsequent discussion of cellular service, we stress here that an important aspect of this

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reliance upon a study concerning cellular rents is also unfounded considering the report's recent refutation. CTIA Reply Comments at 8 n.15, *citing* Haring & Jackson at 1.

[285] CTIA Reply Comments at 3-5; NYNEX Reply Comments at 15-18; Bell Atlantic Reply Comments at 10. *See also* GTE Reply Comments at 10-11; Telocator Reply Comments at 11; US West Reply Comments at 14-15 (the views of California and New York concerning the state of competition are not shared by regulatory commissions in most other states).

[286] CTIA Reply Comments at 4-5. *See also* Bell Atlantic Reply Comments at 10; NYNEX Reply Comments at 16-17 (studies confirm that prices are 10 percent to 15 percent higher in markets where cellular rates are regulated, so regulation hurts consumers).

[287] PacTel Reply Comments at 4-5.

conclusion is that we have decided to initiate a further proceeding in which we will propose to establish extensive and ongoing monitoring of the cellular marketplace as a means of ensuring the forbearance action we take in this Order does not adversely affect the public interest.[288] We have noted California's concerns about regional partnerships involving cellular licensees which are competitors in some markets. These arrangements might result in the sharing of pricing information in joint marketing efforts or they might blunt incentives to compete. These arrangements will be monitored by the Commission and are subject to scrutiny under federal antitrust laws.

139. By our actions here today we have identified that CMRS providers include all cellular licensees, common carrier paging licensees and private carrier paging licensees (except those providing internal service), all wide-area SMR providers, and most SMR providers.[289] Although the cellular service market is not fully competitive,[290] these other services are competitive.

140. First, the paging industry is highly competitive.[291] A recent study found that, on average, a paging carrier faces five other paging carriers competing with it in a given market, and some face as many as nineteen.[292] The combination of high capacity, large numbers of service providers, ease of market entry, and ease of changing service providers results in paging being a very competitive segment of the mobile communications market. In the 900 MHz band alone, there are forty private paging channels, of which roughly two-thirds are licensed to private carriers, and forty common carrier channels. Additionally, there are over thirty common and private carrier paging channels in the 150 MHz and 450 MHz bands.[293] There are three nationwide common carrier paging channels. Current technology permits literally tens of thousands of pagers per market to be served by a single channel, and recent advances are increasing paging channel capacity dramatically. As a result, there is a huge capacity for paging, and relatively easy entry into this market, especially for private carrier paging providers. Paging systems are relatively inexpensive to build. The price of paging equipment and service to end users is falling. Further, the technical similarity of paging equipment, particularly within a given frequency band, along with the low prices of pagers and the ready availability of leasing arrangements, enables paging customers to move easily to the service provider of their choice.

141. Second, consider SMR licensees. Most SMR licensees provide dispatch service and many also provide mobile telephone service. Non-interconnected dispatch services are PMRS. Thus, for purposes of analyzing whether forbearance is in the public interest, the appropriate focus is on the examination of market power in the provision of CMRS, such as mobile telephony.

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[288] *See* para. 194, *infra*.

[289] One recent report estimates that by sometime in the 1990s, there will be over 7,000 800 MHz and 900 MHz SMRs using over 50,000 channels. *See* D. Fertig, Private Radio Bureau, FCC, *Specialized Mobile Radio*, at 24 (Feb. 1991).

[290] *See Cellular CPE Bundling Order*, 7 FCC Rcd at 4028.

[291] *See* EMCI, "The State of the US Paging Industry" (1990); EMCI, "The State of the US Paging Industry" (1993).

[292] *See* Ridley Survey at 20.

[293] Additional paging capacity is available on FM subcarriers that are being used both for private and common carrier paging services under Section 73.295 of the Commission's Rules, 47 C.F.R. § 73.295.

142. The SMR service's current share of the mobile telephone market is small, particularly in comparison with cellular providers.[294] Thus, to the extent that cellular rates are reasonable and would continue to be so under a forbearance regime, one should reach the same conclusion for the provision of mobile telephony by SMR licensees.

143. Some SMRs are installing advanced digital technology and have accumulated enough spectrum under SMR licenses to compete more effectively in the mobile telephony market by offering wide-area services.[295] At least initially, however, SMR licensees face significant competitive disadvantages. First, substantially less spectrum is allocated for SMR than for cellular or PCS.[296] Second, SMR subscriber equipment costs more than cellular subscriber equipment.[297] Third, initial marketing costs for digital SMR may be greater than marketing costs for cellular operators.[298] These barriers are reflected in the significantly lower market valuations of SMR companies as compared to cellular companies.[299] Thus, we conclude that SMRs providing mobile telephone service at present do not appear to have market power in the provision of mobile telephony. Although we anticipate that PCS entry will increase competition in this area, we will continue to monitor this situation as part of our annual review of the CMRS marketplace. [300]

144. The Commission has determined that no air-to-ground service provider is dominant.[301] The Commission found that selection of an open entry plan, coupled with the

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[294] Total SMR units, which are primarily dispatch, are estimated at 1.5 million as of December 1993. Total interconnected units are estimated at 425,000 units, as compared with 13 million cellular telephones. *See* Economic and Management Consultants International, Inc., "The State of SMR & Digital Mobile Radio: 1993-1994," at 1, 105 (Dec. 1993) (EMCI SMR Report).

[295] *See* note 17, *supra*.

[296] The SMR service is allocated 14 MHz in the 800 MHz band and 5 MHz in the 900 MHz band, as compared to a total of 50 megahertz for the two cellular carriers. *See* Part 22 and Part 90 of the Commission's Rules, 47 C.F.R. Parts 22, 90. The spectrum allocated for SMR is not contiguous: it is interspersed with channels designated for Public Safety and other private radio services. This inhibits use of technologies needing wider channel bandwidths. The technical standards for the 800 and 900 MHz bands are substantially different, precluding economic use of both bands in one radio unit.

[297] EMCI SMR Report at 146; M. Carter-Lome, "An Answer to Cellular," Communications, at 29 (Sept. 1993).

[298] Merrill Lynch, "SMR in the United States: A Window of Opportunity," at 28 (Oct. 1993).

[299] For example, the price AT&T agreed to pay for McCaw shares implies a value of approximately $282 per "pop" (*i.e.*, per each member of the resident population in the geographical area involved), whereas the price MCI agreed to pay for Nextel shares implies a value of approximately $43 per pop. *See* S. Malgieri, "SMRs Becoming Hot Investment in 1990's Wireless Technology," Radio Communications Report, Sept. 13, 1993, at 21; E. Andrews, "MCI Plans Big Nextel Stake as a Move into Wireless," N.Y. Times, Mar. 1, 1994, at D1.

[300] Congress has required the Commission to "review competitive market conditions with respect to commercial mobile services and [to] include in its annual report an analysis of those conditions." Communications Act, § 332(c)(1)(C), 47 U.S.C. § 332(c)(1)(C).

[301] *See* Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 Bands, GEN Docket No. 88-96, Report and Order, 5 FCC Rcd 3861, 3865 (1990), *recon. denied*, 6 FCC Rcd 4582 (1991).

competitive pressure created by multiple airlines seeking quality service at low prices, supported streamlined regulation of air-to-ground service providers.[302]

145. Finally, the record on the degree of competition is less clear for cellular service than for the other services in the CMRS marketplace. As indicated earlier, the Commission classified cellular carriers as dominant in a previous proceeding, although it did not engage in a market analysis at that time. The Commission has in the past found, however, that cellular providers face sufficient competition and that it therefore is in the public interest to relax some Commission policies traditionally applied to non-competitive markets.[303]

146. There are two facilities-based providers of cellular service in each geographic market segment. The fact that there are only two carriers raises the question of the extent to which these duopoly providers are able to reach an implicit or explicit agreement not to compete vigorously with one another and thus to elevate rates above their competitive levels. Standard principles of economics indicate that duopolists may be able to sustain what is in effect a shared monopoly — with the attendant elevated prices — either by tacitly agreeing not to price aggressively or by restricting the amount or rate of investment in new capacity. On the other hand, there are reasons that it may be difficult or unprofitable for cellular providers to coordinate their actions in this manner.

147. One limit on the profitability of collusion is provided by competing services. Hence, a key issue is the extent to which other services, such as paging and landline telephone service, compete with cellular. While an increase in the price of cellular services surely will induce some consumers to switch to the use of pagers or a landline service, the degree of cross-price elasticity has not been established in this record.

148. In addition to actual competition today, the threat of potential competition in the future may also affect current cellular pricing and investment. In the near future, there will be up to seven broadband PCS providers in each geographic area. Moreover, narrowband PCS services may compete with cellular to some extent. Since this additional competition will not be a reality for some time, it imposes no direct constraint on current pricing behavior. Nevertheless, impending competition can make any collusive pricing or capacity constraints more difficult to sustain today. The approaching increase in competition may limit the ability, and profitability, of attempts to restrict cellular investment today because today's investments can have significant impacts on the profits that will be earned in the face of PCS competition. A cellular provider may invest in additional capacity now in anticipation of gaining advantage in the coming competitive environment,[304] rather than to restrict output through tacit or explicit collusion with a fellow duopolist.

149. Other factors may also limit a cellular carrier's ability to reach tacit agreements. Rapid changes in the nature of the product can make collusion difficult. For example, one report has determined that quality competition is high, with cellular licensees working to develop techniques that reduce interference and decrease the number of blocked or dropped calls. Price competition has led to equipment discounts to customers of amounts between $100 and $450

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[302] *See id.*

[303] *See Cellular CPE Bundling Order*, 7 FCC Rcd at 4028-29. The Commission found that the cellular market was sufficiently competitive to permit cellular service providers to bundle cellular CPE as long as they did not specifically tie the provision of service with CPE. The Commission recognized that other market characteristics made this bundling in the public interest.

[304] This result may be particularly likely for a service such as cellular telephony, where system ubiquity and capacity (and the resulting blockage rates) are an element of service quality.

when new customers initiate cellular service.[305] Complex pricing structures, such as are used in the cellular industry, make it difficult for a carrier to sustain collusive pricing.[306]

150. As discussed above, commenters offer a variety of arguments and pieces of data that they believe demonstrate the extent of competition. We found none of these analyses to be determinative. CTIA and New Par, citing the same study, point to declines in the real price of cellular services as indicative of competition. This argument is, however, incomplete. It is critical to understand the reason why prices have been falling. For example, even a monopolist may lower its prices as it lowers costs or increases its capacity. Moreover, if prices are continuing to fall, does this logic imply that the markets are not fully competitive? Before reaching a conclusion about the state of competition, one must explain why cellular prices have been falling. Those who allege that prices are falling mainly because of competition do not support that claim with adequate evidence.[307] Similarly, some commenters point to improvements in service quality as evidence of competition. Again, however, one must understand the forces underlying the quality improvements before concluding that vigorous competition is the driver.

151. Some might argue that capacity constraints (rather than the exercise of market power) are what drives quantities, and thus market power has not been a problem. But to be complete explanations, these analyses must account for the fact that capacity is the result of investment choices made by the carriers themselves. As already discussed,[308] a possible theory of collusion in these markets is that firms restrict their capacity levels below competitive levels but then fully utilize that capacity that they have put in place.

152. Cellular systems in some markets have reached their current capacities. Since there is no more spectrum available to allocate for cellular systems, many of the systems have reduced cell size and improved antenna design in order to maximize frequency reuse. Consequently, the only way capacity can be further increased is by converting to digital technology. The two competing digital technologies that are being implemented are time division multiple access (TDMA) and code division multiple access (CDMA). Southwestern Bell Mobile Systems has commercial TDMA systems operating in the Chicago and Dallas-Fort Worth markets.[309] Pactel Corp. and US West New Vector are actively testing CDMA systems. A recent press report indicated that Pactel Corp. will spend about $250 million during the next five years to launch digital cellular systems in California and Georgia using CDMA infrastructure equipment.[310] It has also been reported that US West New Vector will deploy CDMA service in Seattle next

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[305] *See* Affidavit of J. Hausman, *United States v. W. Elec. Co., Inc.*, Civil Action No. 82-0192, at 12-13 (July 29, 1992) (Hausman Affidavit). In order to obtain equipment discounts, it is often necessary for the customer to commit to service with a particular licensee for a minimum length of time. The Commission has found that, on balance, these arrangements are pro-competition and in the public interest. *See Cellular CPE Bundling Order*, 7 FCC Rcd at 4029.

[306] *See* Hausman Affidavit at 12-13.

[307] In a recent *ex parte* presentation, NCRA argues that prices for cellular service to low volume end users are rising. *See Ex Parte* Letter, CC Docket No. 93-252, from D. Gusky, Executive Director, NCRA, to Chairman R. Hundt, FCC, Jan. 24, 1994.

[308] *See* para. 146, *supra*.

[309] *See* Telocator Bulletin, "Southwestern Bell Mobile Cuts Over TDMA Service in Dallas/Fort Worth," at 8, Jan. 21, 1994.

[310] *See* Radio Communications Report, "PacTel Plans To Take CDMA into California and Georgia," at 17, Jan. 31, 1994.

year.[311] This addition of more capacity tends to support the conclusion that cellular service is competitively provided, but the record does not provide clear evidence on whether investment is above or below the competitive level.

153. Bell Atlantic and CTIA argue that regulation of cellular carriers may, in fact, cause higher prices. In order to reach a proper finding that regulation causes higher prices, one must address the alternative hypothesis that partially effective regulation is put into place in those states that would otherwise have had the highest prices by an even greater margin. What explains why some states have regulation and others do not? Again, the record in this proceeding is silent on this point.

154. In summary, the data and analyses in the record support a finding that there is some competition in the cellular services marketplace. There is insufficient evidence, however, to conclude that the cellular services marketplace is fully competitive.

3. *Classes of Commercial Mobile Radio Services*

a. Background and Pleadings

155. Section 332(c)(1)(A) of the Act provides that the Commission may specify certain provisions of Title II as inapplicable to a "service or person."[312] In the *Notice* we tentatively concluded that the Commission has the authority to establish classes or categories of CMRS. The Conference Report indicates that Congress intended to provide this flexibility, but did not mandate such differential regulation.[313] In the *Notice* we tentatively concluded that potential classes might include: existing common carrier mobile services; certain PCS services; and certain private mobile radio services. We sought comment regarding whether we should promulgate regulations that vary among these classes and among different service providers within a class.

156. Most commenters argue that there is no justification for differential treatment of CMRS providers.[314] These commenters contend that CMRS are very competitive and, with the advent of PCS, any given area will have two cellular providers, up to seven PCS providers, and one or more SMRs.[315] McCaw and others aver that in changing Section 332, Congress sought

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[311] *See* Telocator Bulletin, "US West New Vector Completes Calls on Qualcomm CDMA Phone," at 8, Jan. 21, 1994.

[312] Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[313] Conference Report at 491 ("Differential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section.").

[314] *See* Bell Atlantic Comments at 21; BellSouth Comments at 26; CTIA Comments at 31; Century Comments at 3; GTE Comments at 17; McCaw Comments at 5-6; New Par Comments at 3; Pacific Comments at 15; Pactel Comments at 16; Southwestern Comments at 25-26; TDS Comments at 19; USTA Comments at 11; US West Comments at 29; US West Reply Comments at 15. US West contends that, at most, the Commission might consider establishing submarkets for one-way services (paging and narrowband PCS) and two-way services (cellular, wide-area SMRs, and broadband PCS). US West notes, however, that such categories may not survive long, given the rapid developments in technology. *Id.* at 28-29. *See also* PageMart Reply Comments at 10.

[315] *See, e.g.*, Pacific Comments at 15; AT&T Reply Comments at 1-2; CTIA Comments at 33. *See also* McCaw Comments at 6-7 (penetration levels of cellular, paging, and other mobile services are low relative to the potential of wireless communications).

to promote regulatory parity.[316] McCaw contends that the differences among CMRS providers are insufficient to justify dissimilar treatment because no mobile service operator has an entrenched, controlling position in the marketplace.[317] New Par argues that differential regulation among CMRS providers would create artificial market forces that would only hinder "the competitive push and shove of the marketplace."[318]

157. Bell Atlantic contends that the appropriate level of forbearance may vary depending on whether the particular service provided is competing with local exchange service, access service, or interexchange service. Bell Atlantic wants us to forbear from regulating all CMRS providers who vigorously compete in providing local service. In contrast, Bell Atlantic argues that, because interexchange competition is minimal, the Commission should not forbear from regulating AT&T's interexchange services. Bell Atlantic asserts that AT&T's planned acquisition of McCaw makes it essential to retain tariffing requirements on AT&T's provision of CMRS.[319]

158. AT&T replies that its current interexchange services are subject to intense competition. Therefore, argues AT&T, it would not be able to cross-subsidize its CMRS affiliates by extracting higher rates for its already competitive wireline services.[320] Finally, asserts AT&T, even after its merger with McCaw, interexchange services will be strongly competitive and CMRS providers will face competition from multiple providers.[321]

159. Some commenters suggest that certain commercial mobile radio services should be subject to differential regulation based upon their ability to exercise market power, or based upon the amount of bandwidth allocated to such services, or both.[322] Nextel argues that the Commission should adjust the application of Title II to assure that new entrants, such as wide-area SMRs, have a legitimate opportunity to become effective competitors.[323] In-Flight argues that an air-to-ground service provider affiliated with a dominant carrier should remain subject to existing Commission regulations governing competitive communications services to help ensure that a dominant carrier does not unfairly use its market power in other markets to impede

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[316] McCaw Comments at 5-6. *See also* Southwestern Comments at 26; TDS Comments at 19; US West Comments at 29.

[317] McCaw Comments at 6-7; McCaw Reply Comments at 7-13.

[318] New Par Comments at 4-5. *See also* CTIA Comments at 31; CTIA Reply Comments at 11.

[319] Bell Atlantic Comments at 28-30 (AT&T and McCaw should not be permitted to bundle local and long distance service together to sell to customers).

[320] AT&T Reply Comments at 2.

[321] *Id.* at 1-3.

[322] *See, e.g.*, Telocator Comments at 13-15; Arch Comments at 10 (maintain like treatment within the narrowband and broadband classes); New York Comments at 9-10 (ensure greater oversight for dominant versus non-dominant classes; since no PCS licenses issued yet, no forbearance for PCS providers); CenCall Comments at 4-5; Nextel Comments at 22; PA PUC Reply Comments at 14-15. *See also* AMTA Reply Comments at 5-6 (arguing that it is premature to conclude that all commercial mobile services should be regulated identically).

[323] Nextel Comments at 22; Nextel Reply Comments at 10-11 (arguing that McCaw's denial of its competitive advantage is at odds with McCaw's opposition to the lifting of the MFJ prohibition on BOC provision of interLATA services).

competition in the air-to-ground market.[324] Grand urges that all existing public electronic data interchange value added network (EDI VAN) operators should be classified as dominant carriers, subject to the Commission's Open Network Architecture (ONA) requirements.[325]

160. NABER proposes that we create two types of CMRS providers: Commercial I (paging, traditional SMR, for-profit two-way radio) and Commercial II (cellular, wide-area SMRs, and PCS). Commercial I providers, according to NABER, are non-dominant and therefore would get the benefit of Title II forbearance. Carriers in the second group would not receive forbearance treatment because they have market power.[326]

161. CTIA and CenCall refute claims that any provider or group of providers possesses market power sufficient to justify differential treatment.[327] CTIA contends that NABER's proposed disparate treatment of commercial mobile radio services is unnecessary and might threaten the growth of the commercial mobile radio services market. Similarly, argues CTIA, disparate treatment based upon bandwidth is unfounded.[328]

b. Discussion

162. Congress granted the Commission the flexibility to identify different classes of CMRS for purposes of determining whether to forbear from Title II regulation.[329] In the *Notice*, we identified common carrier mobile services, certain PCS services, and certain private mobile services as existing services likely to be classified as CMRS.[330] The major policy reason to establish different categories of CMRS is the possibility that one carrier or class of carriers has market power that requires continued Title II regulation to protect consumers or the public interest. There might also exist other reasons that necessitate differential treatment. Section 332 empowers the Commission to make such a distinction at any time if it becomes necessary to do so. At this time, however, differential tariff and exit and entry regulation of CMRS as a general matter does not appear to be warranted.[331] We will, however, continue to monitor actively the cellular services marketplace.[332] In addition, because we recognize that

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[324] In-Flight Comments at 4, *citing* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873, 3033-37, 3051-53 (1989).

[325] Grand Comments at 8. Grand also argues that all cellular carriers should be regulated as dominant carriers. *Id.* at 7-8.

[326] NABER Comments at iii, 14-15, App. A at 1, 4-5; NABER Reply Comments at 2-5.

[327] CTIA Reply Comments at 11; CenCall Reply Comments at 3-5 (NABER offers no economic, market, or legal support for its proposals and did not consult with CenCall, a group it represents); Nextel Reply Comments at 11-12 (NABER offers no empirical data, economic studies, or other support for its proposals).

[328] CTIA Reply Comments at 10-12.

[329] *See* Conference Report at 491.

[330] *Notice*, 8 FCC Rcd at 7999 (para. 55).

[331] We note that Grand has not demonstrated any basis for our determining that an electronic data interchange value added network (EDI VAN) is a mobile service. Thus, Grand's request that we classify all existing public EDI VANs as dominant is outside the scope of this proceeding.

[332] *See* para. 194, *infra.*

differential regulatory treatment of different classes of CMRS providers may become warranted because of rapidly changing circumstances in the CMRS marketplace, we have decided to initiate a rule making in the near future to examine more specifically whether such differential treatment should be established. A principal focus of this rule making will be the question of whether we should adopt further forbearance actions under Title II of the Act in the case of certain carriers or specified classes of CMRS providers. Further, as we discuss below, we will still retain certain non-structural safeguards for the CMRS affiliates of a dominant landline carrier as well as existing structural safeguards for cellular affiliates of the Bell Operating Companies. We will review these safeguards in the future and remove them if they become unnecessary.[333]

163. We will not address here the issue of what special conditions we may need to impose upon AT&T if the proposed merger between AT&T and McCaw is consummated. Such issues are best left to the Order addressing transfer of control issues or, if necessary, rule making proceedings conducted subsequent to any grant of the pending transfer application.

4. *Forbearance from Particular Title II Sections*

164. The three prongs of the test contained in Section 332(c)(1) must be satisfied before the Commission may exercise its forbearance authority. As discussed in detail below, we have determined that forbearance from enforcing sections of Title II is appropriate where filing and other regulatory requirements would be imposed on CMRS providers without yielding significant consumer benefits. We were particularly concerned with those instances where application of Title II regulations may impede competition. We have decided that forbearance from enforcing provisions related to the complaint remedy, as well as sections containing specific consumer-related provisions, is not justified under the statutory test. We will retain our authority to invoke certain reporting requirements if necessary, and we intend to initiate a review of the cellular marketplace pursuant to this prerogative. We note that we do not intend, by our actions herein, to impose any unwarranted burdens upon private carriers who, pursuant to this Order, find themselves classified as CMRS providers. As described above, we will soon issue a Further Notice of Proposed Rule Making to consider whether further forbearance action is appropriate.[334]

a. Sections 203, 204, 205, 211, and 214

(1) *Background and Pleadings*

165. In the *Notice* we tentatively concluded that we should forbear from enforcing Sections 203, 204, 205, 211, and 214. Section 203 requires common carriers to file a schedule of rates and charges for interstate common carrier services. Section 204 gives the Commission the power to investigate a common carrier's newly-filed rates and practices and to order refunds, if warranted. Section 205 enables the Commission to investigate existing rates and practices and to prescribe rates and practices if it determines that the carrier's rates or practices do not comply with the Communications Act. Section 211 requires common carriers to file with the Commission copies of certain contracts with other carriers. Section 214 is the market entry and

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[333] *See* Part III.E.5, paras. 214-219, *infra*. Of course, there are mobile service providers that are subject to regulation under other sections of the Act and the Commission's Rules. *See, e.g.*, Part 22 of the Commission's Rules, 47 C.F.R. Part 22.

[334] *See* note 33, *supra*.

exit provision, which requires the carriers to seek Commission approval when adding or removing a line.[335]

166. Most commenters argue that because of the competitive nature of the mobile services market, the Commission should adopt a policy of maximum regulatory forbearance.[336] In addressing the statutory test for forbearance, McCaw and other commenters assert that the charges, practices, classifications, or regulations associated with particular mobile services or imposed by particular providers are likely to be just and reasonable and not unjustly or unreasonably discriminatory.[337] McCaw contends that, because cellular carriers lack market power, and sufficient other safeguards exist, such as the continued applicability of Sections 201, 202, and 208, discretionary imposition of Title II requirements is not necessary to protect consumers.[338]

167. McCaw, Century, and other commenters also insist that forbearance from Title II regulation of CMRS providers will promote the public interest.[339] Bell Atlantic concurs, arguing that the cellular industry's rapid growth, nationwide expansion of coverage, declining prices, and introduction of new technologies and services, all while carriers did not file tariffs, demonstrate that tariffing is "not necessary" and that forbearance would be consistent with the public interest.[340] McCaw argues that detailed tariff filing requirements impose substantial competitive costs without providing consumers with any offsetting benefits.[341]

168. As discussed above,[342] commenters argue that in light of the competitive nature of the CMRS marketplace, forbearance from enforcing the tariff filing obligations of Section 203

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[335] For purposes of this proceeding, we will assume that Section 214 applies to radio-based services. *But see* Transamerican Microwave, Inc., Memorandum Opinion and Order, 10 Rad.Reg. (P&F) 2d 975 (1967).

[336] *See, e.g.*, AMSC Comments at 1; AMSC Reply Comments at 1-2; Bell Atlantic Comments at 20-23; Bell Atlantic Reply Comments at 6-11; CTIA Comments at 25; McCaw Comments at 7-10; McCaw Reply Comments at 3-7.

[337] McCaw Comments at 7-8. *See also* In-Flight Comments at 3 (air-to-ground market is intensely competitive, so marketplace forces will ensure that charges and other practices are reasonable).

[338] McCaw Comments at 9; CTIA Comments at 29-30, 34.

[339] McCaw Comments at 10; Century Comments at 5; Saco River Reply Comments at 4-6.

[340] Bell Atlantic Comments at 23.

[341] McCaw Comments at 10, *citing* Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Report and Order, 7 FCC Rcd 8072, 8079 (1992); CTIA Comments at 26-27. *See also* CenCall Comments at 8, *citing Competitive Carrier Further Notice*, 84 FCC 2d at 478-79 (para. 87); Telocator Comments at 20 (Commission has determined that tariff regulation of a competitive market will actually inhibit competition, innovation, market entry, and flexibility, *citing* Tariff Filing Requirements for Non-Dominant Carriers, CC Docket No. 93-36, 8 FCC Rcd 6752 (1993); Erratum, No. 34716, CC Docket No. 93-36, 58 Fed. Reg. 48323 (Sept. 15, 1993)).

[342] *See* para. 130, *supra*.

is in the public interest.[343] Motorola contends that the imposition of Title II requirements, such as tariffing, would disserve the public interest.[344]

169. NCRA, New York, and the PA PUC believe that a decision to forbear from tariff regulation of PCS providers is premature.[345] NCRA also asserts that the Commission should not exercise its forbearance authority unless the evidence it relies on is "indisputable and compelling."[346] Further, NCRA indicates that the Commission has not reversed its policy of classifying facilities-based cellular providers as dominant carriers.[347] NCRA argues that at least the regulation of wholesale rates in the competitive mobile services markets, and in particular the cellular market, is required for the foreseeable future.[348]

170. NCRA argues that while forbearance as to retail rate regulation is acceptable, the Commission should not forbear from applying Section 203 to wholesale rates of commercial mobile radio services.[349] California, New York, and the PA PUC oppose tariff forbearance, claiming that there is insufficient competition to justify forbearing from Section 203.[350]

171. Bell Atlantic argues that some of these provisions, *i.e.*, Sections 204 and 205, merely duplicate enforcement powers the Commission will retain under Section 208 and its general powers under the Communications Act.[351] CenCall asserts that if the Commission forbears from enforcing Section 203, which CenCall supports, the Commission should also

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[343] *See, e.g.*, AMSC Reply Comments at 1-2; Bell Atlantic Comments at 20-23; Bell Atlantic Reply Comments at 6-10; BellSouth Comments at 29; CTIA Comments at 25; GCI Comments at 3; GCI Reply Comments at 1; NYNEX Comments at 18-19; NYNEX Reply Comments at 14-15.

[344] Motorola Comments at 18.

[345] NCRA Comments at 14-15; New York Comments at 10-11; PA PUC Reply Comments at 15 (any tentative conclusion with regard to the competitive market conditions in the cellular marketplace without an effort to collect the necessary data, would be premature, if not a clear abdication of congressionally mandated duty). *See also* California Comments at 7-8.

[346] NCRA Comments at 15 & n.10, *citing Cellular CPE Bundling Order*, 7 FCC Rcd at 4029; GAO, Concerns About Competition in the Cellular Telephone Service Industry, July 1992. *See also* NCRA Comments at 15-16 (in recognition of Congress's recent amendment to Section 332(c)(1)(C), Commission should perform a detailed review of competitive market conditions with respect to commercial mobile services).

[347] *Id.* at 15-16, *citing Competitive Carrier, Fifth Report*, 98 FCC 2d at 1201 n.41.

[348] *Id.* at 16. NCRA claims that it does not object to forbearance of retail rate regulation if resellers have (1) access to cost-based rates for only those basic bottleneck services that they are forced to obtain from a facilities-based cellular carrier; and (2) an efficient, timely, and effective means of enforcing access to such rates is available at the Commission. NCRA asserts that such means, short of filing tariffs with all supporting data, are within the Commission's power. *Id.* at 17-18.

[349] *Id.*

[350] California Comments at 5-6; New York Comments at 10-11; PA PUC Reply Comments at 14-16.

[351] Bell Atlantic Comments at 27. *See also* TRW Reply Comments at 22-23 ("The anticipated level of competition in the MSS/RDSS field makes Title II regulation of this new service area particularly unnecessary.").

forbear from Sections 204 and 205, which "go hand-in-hand" with the Section 203 tariff requirement.[352]

172. Bell Atlantic and others insist that Sections 211 and 214 burden carriers with paperwork which would be irrelevant once tariffs are not accepted.[353] GTE argues that since competitive market conditions make tariffs unnecessary, the filing of contracts required by Section 211, is also unnecessary.[354] BellSouth contends that on its face, Section 214 applies to communications by wire only and is inapplicable here.[355] CenCall avers that enforcement of Section 214 is unnecessary, since there is no monopoly provider.[356]

(2) ***Discussion***

173. As we discussed in the Notice, in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs. The Commission determined in *Competitive Carrier* that non-dominant carriers are unlikely to behave anti-competitively, in violation of Sections 201(b) and 202(a) of the Act, because they recognize that such behavior would result in the loss of customers.[357]

174. Concerns about the ramifications of tariff forbearance are unwarranted. Despite the fact that the cellular service marketplace has not been found to be fully competitive, there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings. As we discussed above, most CMRS services are competitive.[358] Competition, along with the impending advent of additional competitors, leads to reasonable rates. Therefore, enforcement of Section 203 is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory.

175. We have concluded that although the record does not support a finding that the cellular services marketplace is fully competitive, the record does establish that there is sufficient competition in this marketplace to justify forbearance from tariffing requirements. We reach this conclusion for three reasons. First, cellular providers do face some competition today, and the strength of competition will increase the near future. Second, the continued applicability of Sections 201, 202, and 208 will provide an important protection in the event there is a market

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[352] CenCall Comments at 9-10. *See also* GCI Comments at 3.

[353] Bell Atlantic Comments at 27; GTE Comments at 14; McCaw Comments at 8. *See also* In-Flight Comments at 4 (since 800 MHz air-ground service is a competitive market, enforcement of these provisions is not necessary to protect consumers because marketplace forces will provide the consumer protection these sections were designed to provide).

[354] GTE Comments at 17.

[355] BellSouth Comments at 29-30.

[356] CenCall Comments at 10-11, *citing Competitive Carrier, Further Notice*, 84 FCC 2d at 490 (para. 117).

[357] *Competitive Carrier Notice*, 77 FCC 2d at 334-38; *Competitive Carrier, First Report*, 85 FCC 2d at 31.

[358] *See* Part III.E.2, paras. 126-154, *supra*.

failure. Third, tariffing imposes administrative costs and can themselves be a barrier to competition in some circumstances.

176. Compliance with Sections 201, 202, and 208 is sufficient to protect consumers. In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act. Although we will forbear from enforcing our refund and prescription authority, described in Sections 204 and 205, we do not forbear from Sections 206, 207, and 209, so that successful complainants could collect damages.

177. Finally, in light of the fact that tariffs are not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates, forbearing from applying Section 203 of the Act to CMRS providers is consistent with the public interest for a number of reasons. In a competitive environment, requiring tariff filings can (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings.[359] Second, tariff filings would enable carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level.[360] Moreover, tariffs may simplify tacit collusion as compared to when rates are individually negotiated,[361] since publicly filed tariffs facilitate monitoring. Third, tariffing, with its attendant filing and reporting requirements, imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition. Finally, forbearance will foster competition which will expand the consumer benefits of a competitive marketplace. The absence of tariff filing requirements and the attendant notice periods should promote competitive market conditions by enabling CMRS providers to respond quickly to competitors' price changes. Carriers will be motivated to win customers by offering the best, most economic service packages. In this context, with the near-term growth of competition, it is reasonable to conclude, as required by Section 332(c)(1)(C), that forbearance at this time will "promote competitive market conditions" and will enhance competition among CMRS providers. Conversely, retaining tariffs under these conditions may limit competition. In light of the social costs of tariffing, the current state of competition, and the impending arrival of additional competition, particularly for cellular licensees, forbearance from requiring tariff filings from cellular carriers, as well as other CMRS providers, is in the public interest.

178. Even permitting the filing of tariffs, in the case of non-dominant carriers in competitive markets, is not in the public interest. As discussed above, we concluded that in a competitive environment, requiring tariff filings can inhibit competition. Indeed, even permitting voluntary filings would create a risk that competitors would file their rates merely to send price signals and thereby manipulate prices.[362] By refusing to accept these tariff filings we prevent

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[359] This result is supported by an earlier Commission decision. In the *Sixth Report* of the *Competitive Carrier* proceeding the Commission concluded that prohibiting non-dominant carriers from filing tariffs for interstate services would serve the public interest. *Competitive Carrier, Sixth Report*, 99 FCC 2d at 1029-30. We determined that tariffs are not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates. *Id. See also Competitive Carrier, Further Notice,* 84 FCC 2d at 454.

[360] *See Competitive Carrier, Sixth Report*, 99 FCC 2d at 1029-30.

[361] Of course, the requirements of Section 202(a) of the Act remain intact.

[362] Further, tariffs would add an unnecessary cost to the Commission's administration of the CMRS marketplace.

carriers from hiding behind their tariffs to avoid reducing their rates. To avoid the introduction of these anti-competitive practices, to protect consumers and the public interest, and because continued voluntary filing of tariffs is an unreasonable practice for commercial mobile radio services under Section 201(b) of the Act, we will not accept the tariff filings of CMRS providers.[363] Those CMRS providers with tariffs currently on file for domestic CMRS services must cancel those tariffs within 90 days of publication of this *Order* in the Federal Register.

179. Specifically, we will forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers. We also will temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service. At this time, because of the presence of competition in the CMRS market, access tariffs seem unnecessary. We recognize, however, that there may be other public interest factors that would make forbearance with respect to interstate access service inappropriate. As such, we will look at this question in more detail in proceedings addressing interconnection issues and equal access.[364] The revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates. Thus, our decision to forbear from requiring the filing of federal (*i.e.*, interstate) tariffs has no impact on those services. States may require CMRS providers to file terms and conditions for their intrastate services and, of course, states may petition the Commission to regulate intrastate commercial mobile service rates.[365]

180. Sections 204 and 205 of the Act aid in the enforcement of tariff regulation. Sections 204 and 205 provide the method of redress in the event that tariffs contain unreasonably discriminatory rates or practices. Since we have determined that we may forbear from enforcing Section 203, forbearance from enforcing Sections 204 and 205 is unlikely to injure consumers and is in the public interest. Moreover, the oversight provisions in these sections duplicate the enforcement powers the Commission will retain in Section 208 and our general powers under the Communications Act. Therefore, we forbear from regulating pursuant to Sections 204 and 205 for commercial mobile radio services.

181. Section 211 of the Act requires that copies of certain contracts with other carriers be filed with the Commission. Because we have found that competition among commercial mobile radio services is sufficient to justify forbearing from requiring tariffs, it is unlikely that contracts will contain unreasonably discriminatory rates or regulations. Therefore, we conclude that consumers will not be harmed if we forbear from the contract filing provisions of Section 211. Competitive market forces will ensure that inter-carrier contracts will not be used to harm consumers. In the unlikely event that they contain provisions that violate Section 201 or Section 202, these contracts can be obtained in the course of a Section 208 complaint proceeding. Therefore, Section 211 forbearance is in the public interest.

182. We will also forbear from exercising our Section 214 authority.[366] Section 214 requires that certain carriers submit applications to the Commission for the provision of new

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[363] The Court of Appeals for the District of Columbia Circuit reversed the Commission's earlier Order requiring carriers to withdraw their existing tariffs, finding that such action was inconsistent with Section 203(a) of the Act. MCI v. FCC, 765 F.2d 1186, 1193-94 (D.C.Cir. 1985). This decision has been superseded by the legislative changes made to Section 332 giving the Commission discretion as to the continuing applicability of Section 203 to CMRS providers.

[364] *See* paras. 236-238, *infra*.

[365] *See* Budget Act, § 6002(c)(2)(A).

[366] *See* note 335, *supra*.

facilities or the discontinuance of existing facilities.[367] One purpose of Section 214 is to protect ratepayers who are captives of monopoly communications service providers from paying for unnecessary or unwise facilities construction and to prevent a dominant carrier from discontinuing needed services where an adequate substitute is unavailable.[368] In *Competitive Carrier*, the Commission recognized that, in a competitive market, application of Section 214 could harm firms lacking market power since certification procedures can actually deter entry of innovative and useful services, or can be used by competitors to delay or block the introduction of such innovations. The presence of Section 214 barriers to exit may also deter potential entrants from entering the marketplace. The Commission also recognized that the time involved in the decertification process can impose additional losses on a carrier after competitive circumstances have made a particular service uneconomic and, if adequate substitute services are abundantly available, the discontinuance application is unnecessary to protect consumers. This analysis is equally applicable to the CMRS marketplace. We conclude that exercise of our Section 214 authority is unnecessary to ensure against unreasonable charges and practices, or to protect consumers, and that forbearance will better serve the public interest by avoiding the social costs identified in this paragraph.[369]

b. Sections 206, 207, 209, 216, and 217

(1) *Background and Pleadings*

183. Sections 206 (Liability of Carriers for Damages), 207 (Recovery of Damages), and 209 (Orders for Payment of Money) are provisions associated with the complaint remedy described in Section 208, from which the Commission may not forbear under the terms of the Budget Act. In the *Notice* we tentatively concluded that there was no record to support forbearance from enforcing any of these sections for any CMRS provider and that forbearance would not be consistent with the public interest. In the *Notice*, we tentatively concluded that there was no record to support the Commission's forbearing from enforcing Sections 216 (Application of Act to Receiver and Trustees) and Section 217 (Liability of Carrier for Acts and Omissions of Agents) for any CMRS provider and that forbearance would not be consistent with the public interest.

184. All parties that submitted comments on this issue agree that the Commission should not forbear from enforcing Sections 206, 207, and 209.[370] GCI argues that these provisions relate to the complaint process.[371] GCI also asserts that Congress intended for all providers to comply with sections relating to the complaint process.[372]

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[367] *Competitive Carrier, Second Report*, 91 FCC 2d at 65.

[368] *See Competitive Carrier, Further Notice*, 84 FCC 2d at 489.

[369] We decline to act at this time on the Motorola suggestion that we issue a Notice of Proposed Rule Making proposing forbearance for international commercial mobile radio services. *See* Motorola Comments at 17.

[370] GCI Comments at 3; Mtel Comments at 17-18; Nextel Comments at 22; NYNEX Comments at 21; PA PUC Reply Comments at 16; Pacific Comments at 17; Southwestern Comments at 29; Sprint Comments at 13.

[371] GCI Comments at 3-4; GCI Reply Comments at 3-4.

[372] GCI Comments at 3-4.

185. Those commenters that addressed the question of forbearance from applying Sections 216 and 217 agree with our tentative conclusion.[373] NYNEX argues that enforcement of these sections is consistent with the intent of Congress to give consumers some measure of protection against possible carrier abuses and to provide the public with adequate safeguards without jeopardizing the development of a competitive market.[374]

(2) *Discussion*

186. We conclude that the public interest will not be served if we forbear from enforcing Sections 206, 207, and 209. These sections make carriers liable for monetary damages to any party aggrieved by a violation of the Communications Act, and guarantee the right of successful complainants to pursue the collection of damages either through the courts or the Commission. By prohibiting forbearance from Section 208, Congress intended that any potential violation of Section 201 or Section 202 could be redressed. Because Section 332 does not permit the Commission to forbear from enforcing Section 208, forbearing from enforcing those sections that provide the remedies for parties who successfully pursue a complaint would eviscerate the protections of Section 208. Without the possibility of obtaining redress through collection of damages, the complaint remedy is virtually meaningless. Therefore, it is in the public interest not to forbear from enforcing these sections against any CMRS provider.

187. We also conclude that the public interest will not be served if the Commission forbears from enforcing Sections 216 and 217. These sections merely extend the Title II obligations of CMRS providers to their trustees, successors in interest, and agents. The sections were intended to ensure that a common carrier could not evade complying with the Act either by acting through others over whom it has control or by selling its business. To assure that the congressional intent behind the decision not to permit forbearance from Sections 201, 202, and 208 is not frustrated, we conclude that we should not forbear from enforcing the obligations imposed by Sections 216 and 217 of the Act.

c. Sections 210, 212, 213, 215, 218, 219, 220, and 221

(1) *Background and Pleadings*

188. As we discussed in the *Notice*, Section 210 (Franks and Passes), Section 212 (Interlocking Directorates - Officials Dealing in Securities), Section 213 (Valuation of Carrier Property), Section 215 (Transactions Relating to Services, Equipment, and So Forth), Section 218 (Inquiries into Management), Section 219 (Annual and Other Reports), Section 220 (Accounts, Records, and Memoranda) and Section 221 (Special Provisions Relating to Telephone Companies) concern matters of Commission authority and specific obligations placed on carriers.[375] In the *Notice* we tentatively concluded that we should forbear from enforcing these provisions.

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[373] Mtel Comments at 17-18; NYNEX Comments at 21; Sprint Comments at 13.

[374] NYNEX Comments at 21.

[375] Sections 222 (Competition Among Record Carriers) and 224 (Regulation of Pole Attachments) do not appear to apply to commercial mobile services, so a determination concerning forbearance is not required. *See Notice*, 8 FCC Rcd at 8001 (para. 65 n.87). BellSouth expressed agreement with the Commission in its comments. BellSouth Comments at 30-31.

189. Several commenters assert that we should forbear from enforcing these sections.[376] Bell Atlantic argues that none of these provisions is necessary to ensure that service rates are just, reasonable, and non-discriminatory, and they are not needed in order to protect consumers.[377] GTE asserts that Sections 213, 215, 219, and 220 are recordkeeping, reporting, accounting, depreciation, and transactional filing requirements that should be forborne for the same reasons that tariff filing requirements should also be forborne.[378] GTE also contends that the management and merger limitations in Sections 212, 218, and 221 are irrelevant in a competitive market.[379]

190. Bell Atlantic contends that all of these sections were intended to impose a level of oversight that was deemed appropriate for regulating monopoly phone companies, but which is unwarranted for the competitive, multi-player mobile services market. Bell Atlantic and other commenters argue that these sections have nothing to do with rates but rather burden carriers with paperwork that would be irrelevant once tariffs are not accepted.[380] CTIA asserts that these requirements are inconsistent with a regulatory regime which refrains from regulating rates.[381] Further, CTIA, Mtel, and Motorola argue that it is not necessary and is unreasonably costly in a competitive market closely to oversee management, including the monitoring of directorship positions, technical developments, annual reports, and specific accounting records, because marketplace forces will ensure that firms perform efficiently.[382]

191. California urges the Commission not to forbear from prescribing accounting systems under Section 220 for dominant providers of commercial mobile radio services in order to guard against anti-competitive abuses by such providers.[383] California alleges that with many of the dominant carriers receiving PCS licenses, proper accounting systems should be prescribed in order to deter cross-subsidy and other anti-competitive behavior.[384]

(2) *Discussion*

192. We note that the Commission infrequently exercises its authority under most of these sections for carriers lacking market power. For example, the Commission has imposed no accounting requirements on non-dominant wireline carriers pursuant to Section 220. In addition, non-dominant wireline carriers have been exempted from filing forms required of dominant wireline carriers pursuant to Section 219. Therefore, none of these provisions places any

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[376] AMSC Comments at 5; AMSC Reply Comments at 2; Bell Atlantic Comments at 27; BellSouth Comments at 30-31; CTIA Comments at 35-36; CenCall Comments at 11-12; GCI Comments at 3; GTE Comments at 17; GTE Reply Comments at 8; In-Flight Comments at 2-3; Mtel Comments at 17-18; Motorola Comments at 18-19; Pacific Comments at 17; RCA Comments at 6-7; Southwestern Comments at 29; Sprint Comments at 12-13; TDS Comments at 20; Telocator Comments at 20; TRW Comments at 31.

[377] Bell Atlantic Comments at 26.

[378] GTE Comments at 17.

[379] *Id.*

[380] Bell Atlantic Comments at 27; CTIA Comments at 35.

[381] CTIA Comments at 35.

[382] *Id.* at 35-36; Mtel Comments at 18; Motorola Comments at 18-19.

[383] California Comments at 8.

[384] *Id.*

unwarranted or burdensome duty upon CMRS providers. Furthermore, we find that the three-pronged statutory test justifying forbearance is not satisfied. While these sections have no direct effect on the reasonableness of rates or practices, they may be necessary for the protection of consumers if some market failure occurs. If such powers were needed, and the Commission had earlier determined to forbear from exercising those powers, the Commission would first have to initiate a rule making proceeding in order to regulate under these sections. There is no countervailing public interest reason to justify our limiting our ability to act if the need arises. Before forbearing, we must determine that the provision is not necessary to protect against unreasonable rates, and to protect consumers, and that forbearing from enforcing the provision is consistent with the public interest. No one has shown that forgoing our authority to act under Sections 210, 213, 215, 218, 219, 220, and 221, will promote competitive market conditions and enhance competition among CMRS providers, which the statute makes part of the public interest analysis of the third prong of the public interest test.

193. Although we proposed to forbear from exercising our authority under Sections 210, 212, 213, 215, 218, 219, 220, and 221 in the *Notice*, upon further review we find that we should only forbear from regulating pursuant to Section 212. Section 210 is unrelated to Commission authority or regulatory obligations. Rather, it allows common carriers to issue franks and passes to their employees, and to provide the Government with free service in connection with preparation for the national defense. The remaining sections, other than Section 212, are primarily reservations of Commission authority, which the Commission may exercise, as necessary. Section 213 authorizes the Commission to make a valuation of all or of any part of the property owned or used by any carrier. Section 215 gives the Commission the authority to examine carrier activities and transactions likely to limit the carrier's ability to render adequate service to the public, or to affect rates.[385] Section 218 authorizes the Commission to inquire into the management of the business of the carrier. Section 219, *inter alia*, authorizes the Commission to require annual reports from carriers.[386] Section 220 gives the Commission the discretion to prescribe the forms of accounts, records, and memoranda to be kept by carriers and also includes depreciation prescription provisions. Section 221, *inter alia*, gives the Commission the power to review proposed consolidations and mergers of telephone companies, and also describes the jurisdiction of the states when an exchange area crosses state lines. Although we will not exercise our authority to require annual reports or to prescribe forms of accounts, relinquishing our power to so act is unnecessary. To date, the Commission has not imposed the reporting requirements listed here on common carriers who are now being classified as CMRS providers. Thus, reservation of these powers should have no adverse impact on competitors.

194. In assessing whether to forbear from Sections 210, 212, 213, 215, 218, 219, 220, and 221 in the case of cellular carriers, we note that the cellular market is not yet fully competitive. Therefore, we have decided to initiate a proceeding in the near future to determine what information collection requirements should apply to cellular carriers. These requirements would be intended to ensure that competition in the cellular marketplace continues to develop in a manner that results in reasonable pricing and the absence of unreasonably discriminatory practices in the pricing and delivery of cellular services. We also wish to underscore our view that a variety of factors (*e.g.*, the advent of personal communications services) will work to enhance competition in the cellular marketplace in the near term. Nonetheless, we believe it is

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[385] Section 215 is also one source of our authority to establish our program of equipment registration. *See NCUC I.*

[386] *See* Section 43.21(a) of the Commission's Rules, 47 C.F.R. § 43.21(a).

prudent for the Commission to gather sufficient data to enable us to confirm our expectations regarding the role competition will play with regard to cellular services.[387]

195. The issues we expect to raise in the proceeding include, *inter alia*: (1) the type of information to be collected; (2) the frequency with which periodic reports of information should be submitted to the Commission; (3) whether these reporting requirements should apply to all cellular carriers and all cellular markets; and (4) policies that should apply to any asserted confidentiality applicable to information submitted.

196. Section 212 does impose an obligation upon carriers. Section 212 empowers the Commission to monitor interlocking directorates, *i.e.*, the involvement of directors or officers holding such positions in more than one common carrier. A person seeking to become an officer in two or more carriers must apply to the Commission and must provide "a full explanation of the reasons why grant of the authority sought will not adversely affect either public or private interests . . . [and] address whether grant of the permission requested could result in anticompetitive conduct."[388]

197. Forbearance from enforcing Section 212 will reduce regulatory burdens without adversely affecting CMRS rates. Section 212 was originally adopted to prevent interlocking directors and officers from engaging in such practices as price fixing. The antitrust concerns that Section 212 was designed to address are already addressed through other Title II provisions[389] or by the antitrust laws.[390] Thus, regulation under Section 212 is not necessary to protect consumers. Finally, forbearance is in the public interest because it eliminates unnecessary filing burdens that could otherwise impose additional costs upon CMRS providers.

d. Sections 223, 225, 226, 227, and 228

(1) *Background and Pleadings*

198. As we stated in the *Notice*, Sections 223 (Obscene or Harassing Telephone Calls in the District of Columbia or in Interstate or Foreign Communications), 225 (Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals), 226 (Telephone Operator Consumer Services Improvement Act (TOCSIA)), 227 (Restrictions on the Use of Telephone Equipment (auto dialing, telemarketers)) and 228 (Regulation of Carrier Offering of Pay-Per-Call Services) are provisions of more recent origin offering explicit protections to consumers. We sought comment on whether we should forbear from applying any of these provisions to CMRS providers.

199. NYNEX, Mtel, and other commenters argue generally that enforcement of Sections 223, 225, 226, 227, and 228 is consistent with the intent of Congress to provide consumers with some measure of protection against possible carrier abuses, and assert that application of these safeguards will provide the public with adequate safeguards without jeopardizing the

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[387] We will also, as required by the statute, conduct an annual review of the CMRS marketplace to determine whether the level of Title II regulation is appropriate. *See* para. 143 & note 300, *supra*.

[388] Section 62.11 of the Commission's Rules, 47 C.F.R. § 62.11.

[389] *See, e.g.*, Communications Act, §§ 201(b), 221, 47 U.S.C. §§ 201(b), 221.

[390] *See, e.g.*, Clayton Act, § 9, 15 U.S.C. § 19, which governs interlocking directorates.

development of a competitive market.[391] These commenters urge the Commission to continue to enforce these provisions.

200. GTE, McCaw, NTCA, and TRW urge the Commission to forbear from enforcing these sections.[392] TRW contends that although these are important protections for consumers, the Commission does not know at this point which of these provisions, if any, are necessary or appropriate for application to CMRS providers.[393] TRW asserts that the Commission has the right to revisit the matter on a case-by-case basis should abuses occur.[394] McCaw argues that because these sections were enacted to remedy perceived deficiencies in other segments of the telecommunications market, they should not apply to CMRS providers unless there is a documented need.[395]

201. Motorola argues that the Commission should forbear from requiring paging service providers to contribute to recovery of Telecommunications Relay Service (TRS) costs, as identified in Section 225 of the Act. Other non-voice services, such as mobile satellite services, are exempt from both providing and funding TRS because these services are already accessible to the hearing impaired. Motorola and Telocator insist that the same is true of paging, which should be treated similarly. Moreover, asserts Motorola, this result is consistent with the congressional intent that TRS contributions come from providers of interstate telephone voice transmission service, rather than from one-way services such as paging.[396] Watercom argues that Section 225 has virtually no application to Watercom's service, which is rendered to towboats and other similar commercial vessels.[397]

202. GTE, McCaw, and other commenters argue that, in particular, the Commission should forbear from enforcing Section 226 (TOCSIA).[398] McCaw and Telocator insist that Section 226 was adopted in response to specific consumer abuses by segments of the

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[391] NYNEX Comments at 21; Mtel Comments at 17-18. *See also* California Comments at 8; GCI Comments at 4; Pacific Reply Comments at 9; Southwestern Comments at 29; Sprint Comments at 13; TDS Comments at 20.

[392] GTE Comments at 18; GTE Reply Comments at 9; McCaw Comments at 11-12; McCaw Reply Comments at 11-12 n.30; NTCA Comments at 7 (premature to apply these sections to PCS providers); TRW Comments at 32-33.

[393] TRW Comments at 32.

[394] *Id.* at 33. *See also* McCaw Comments at 11.

[395] McCaw Comments at 11.

[396] Motorola Comments at 19; Telocator Comments at 22, *citing* Telocator, Petition for Reconsideration at 3-4, CC Docket No. 90-571 (filed Aug. 25, 1993).

[397] Watercom Comments at 9-10; Watercom Reply Comments at 2. *See also* MMR Reply Comments at 8.

[398] GTE Comments at 18-19; McCaw Comments at 5-6. *See also* In-Flight Comments at 5-6; Motorola Comments at 19; PTC-C Comments at 2-11; TDS Reply Comments at 6-7; Telocator Comments at 21; Telocator Reply Comments at 12; TRW Comments at 32-33; TRW Reply Comments at 23; Watercom Comments at 10-12; Watercom Reply Comments at 2. *See also* MMR Reply Comments at 8-9.

telecommunications industry other than providers of mobile services.[399] GTE contends that forbearance is justified under revised Section 332.[400] Specifically, GTE asserts that enforcement of TOCSIA is not necessary to ensure reasonable charges and practices for mobile public phone services since providers of these services already are subject to the non-discrimination requirements of Section 202 of the Act. Moreover, argues GTE, mobile carriers providing interstate service to which TOCSIA might arguably apply are non-dominant and, therefore, presumptively lack the market power to engage in unreasonably discriminatory conduct. In addition, the economic interest of the service provider lies in maximizing demand for its offering in order to build market share. Unreasonable rates or practices would deter consumers from using its service and lower revenues.[401]

203. GTE and PTC-C also aver that enforcement of TOCSIA with respect to mobile phone service is not necessary to protect consumers.[402] GTE contends that the legislative history reveals that when Congress considered TOCSIA, there was no evidence in the record of consumer abuses stemming from public mobile phone service.[403] Further, asserts GTE, the Commission has yet to receive a complaint alleging operator service provider-type abuses by a mobile service provider.[404] In fact, argues GTE, providers of public mobile phone services generally publish the rates and conditions relating to those services, as well as numbers that the user can dial to obtain additional information before incurring any charges, and traditionally have not blocked access to alternative long distance carriers. Thus, according to GTE, application of TOCSIA is not necessary.[405] Finally, GTE contends that waiver of TOCSIA is entirely consistent with the public interest since compliance with that statute would often be impossible or produce absurd results.[406]

204. Coastel, In-Flight, PTC, and Watercom argue that the Commission should forbear from applying TOCSIA to their particular type of service, alleging that compliance would impose an undue hardship upon them.[407] These commenters also assert that the Common

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[399] McCaw Comments at 5; Telocator Comments at 21; Telocator Reply Comments at 12 (tariff regulation in a competitive market is unnecessary and actually harmful to the public interest).

[400] GTE Comments at 18. *See also* In-Flight Comments at 5-6.

[401] GTE Comments at 18.

[402] *Id.*; PTC-C Comments at 5-6.

[403] GTE Comments at 18.

[404] *Id.* at 18-19. *See also* PTC-C Comments at 7.

[405] GTE Comments at 19. *See also* Motorola Comments at 19.

[406] GTE Comments at 19, *citing* Petition for Declaratory Ruling That GTE Airphone, GTE Railphone, and GTE Mobilnet Are Not Subject to TOCSIA, MSD-92-14, Declaratory Ruling, DA 93-1022, 8 FCC Rcd 6171 (Com.Car.Bur. 1993)(*TOCSIA Declaratory Ruling*), *recon. pending*, GTE, Petition for Reconsideration or Waiver at 7-9 (filed Sept. 27, 1993) (asserting that many concepts underlying TOCSIA, such as "local," "toll," and "distance-sensitivity," often do not apply in the case of mobile phone services and landline operator services).

[407] Coastel Reply Comments, *passim*; In-Flight Comments at 5; In-Flight Reply Comments at 2 (it would be unlawful for the Commission to require compliance with Section 226); PTC-C Comments, *passim*; Watercom Comments at 11. Coastel is one of the cellular licensees for the Gulf of Mexico. In-Flight provides air-to-ground service. PTC provides cellular phones for rental cars. Watercom provides maritime common carrier service along the Mississippi, Illinois, and Ohio Rivers, and the Gulf

Carrier Bureau erred when it determined that they are aggregators, as defined in TOCSIA, and therefore subject to the requirements of Section 226.[408] In-Flight urges the Commission to reverse the Bureau's decision.[409] In-Flight, PTC, and Watercom also argue that compliance with TOCSIA is difficult, illogical, and unnecessary to meet any of the three objectives set forth in Section 332(c)(1) of the Act.[410] In-Flight asserts that imposing the equal access requirements of TOCSIA would be beyond the scope of this proceeding.[411]

(2) *Discussion*

205. The commenters, with the exceptions described above, support the continued enforcement of these sections. We conclude that the public interest will not be served if the Commission forbears from enforcing Sections 223, 225, 226, 227, and 228.

206. Section 223 prohibits individuals from placing obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications. Section 223 also regulates "indecent" telephone communications involving children and restricts the access of minors to those services commonly referred to as "Dial-A-Porn," including providing for the assessment of fines of up to $50,000 per violation.[412] Those commenters opposing the enforcement of this section of Title II do not offer any evidence to show that forbearance would meet the test found in Section 332(c)(1)(A). The presence of competition will not protect consumers from the types of activities regulated here. The policy considerations that supported the statute's adoption still exist and there is no reason why CMRS operators should not be required to comply.

207. One of the mandates of the Americans with Disabilities Act of 1990 (ADA), is that the Commission ensure that interstate and intrastate telecommunications relay services[413] are available to the extent possible and in the most efficient manner to individuals in the United States with hearing and speech disabilities. Accordingly, the Commission has required all

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Intracoastal Waterway. These commenters make arguments in support of forbearance for their particular services, not for commercial mobile services generally.

[408] Coastel Reply Comments at 2-3; In-Flight Comments at 5-6; PTC-C Comments at 3, *citing* S. Rep. No. 439, 101st Cong., 2d Sess. at 1 (1990) (legislative history does not list public mobile telephones, so Congress did not intend to include public mobile telephones in its definition of "aggregator"); Watercom Comments at 11.

[409] In-Flight Comments at 5, *citing TOCSIA Declaratory Ruling*. In-Flight notes that the Common Carrier Bureau is presently considering a petition for reconsideration of the Declaratory Ruling which requests reversal of the Bureau's finding that an air-ground licensee is an "aggregator." *Id.*, *citing TOCSIA Declaratory Ruling*, GTE, Petition for Reconsideration or Waiver (filed Sept. 27, 1993).

[410] In-Flight Comments at 5-6, *citing* its comments in the pending *TOCSIA Declaratory Ruling* reconsideration proceeding; PTC Comments at 3-9; Watercom Comments at 10-11. Coastel alleges that if it is forced to comply with the requirements of TOCSIA, it and the other Gulf of Mexico licensee might be forced out of business. Coastel Reply Comments at 5-6.

[411] In-Flight Reply Comments at 1.

[412] *See* Communications Act, § 223(b), 47 U.S.C. § 223(b).

[413] Telecommunications relay service (TRS) allows people with hearing or speech disabilities (or both) to use the telephone.

interstate service providers (other than one-way paging services) to provide TRS.[414] Last year the Commission amended its rules to require that interstate TRS costs be recovered by charges assessed on all interstate telecommunications service providers based on their relative share of gross interstate revenues for telecommunications services.[415]

208. TRS promotes consumer access to the public switched network. Competition does not necessarily induce CMRS providers to make this service available. We do not find any justification, and no commenter has supplied adequate justification, for not applying Section 225 to CMRS providers.[416] Those commenters supporting forbearance failed to provide the information required by Section 332(c)(1)(A) of the Act. The issue of which carriers should contribute to the TRS fund is beyond the scope of this proceeding.

209. In October 1990, Congress enacted TOCSIA,[417] to protect consumers making interstate operator services calls from pay telephones, and other public telephones, against unreasonably high rates and anti-competitive practices.[418] Congress noted that in recent years a number of operator services companies have emerged. These operator service providers (OSPs) compete with local exchange and long distance carriers by providing telephone services to the general public.[419] When a caller places an operator assisted call from a telephone presubscribed to one of these OSPs, the call is routed automatically to that presubscribed OSP. The OSP provides the desired operator services to facilitate completion of the call. Congress had two main objectives in passing TOCSIA. First, Congress wished to ensure that consumers are aware of the identity of the presubscribed operator service provider. Second, Congress wanted to guarantee that callers are able to use the carrier of their choice in placing operator-assisted calls.

210. TOCSIA requires an OSP, *inter alia*, to identify itself to the consumer at the beginning of the call, to permit the consumer to terminate the call at no charge before the call is connected, and to disclose to the consumer, upon request, a quote of its rates and charges for the call, the method of collection, and the method for processing complaints concerning the

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[414] Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Notice of Proposed Rule Making, 5 FCC Rcd 7187 (1990); Report and Order and Request for Comment, 6 FCC Rcd 4657, 4660 (para. 17) (1991) (*TRS Order*); Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd 1802 (1993) (*TRS II*); Third Report and Order, 8 FCC Rcd 5300 (1993) (*TRS III*).

[415] *See TRS III*, 8 FCC Rcd at 5303. *See also TRS II* at Appendix D, Section 64.604(c)(4)(iii)(a) of the Commission's Rules, 47 C.F.R. § 64.604(c)(4)(iii)(a).

[416] We note, however, that in a recent *ex parte* presentation, Nextel argues that compliance with the technical requirements of Section 225 is not easily achieved. *See* Nextel *Ex Parte* Letter, from R. Foosaner to G. Vaughan, at 3, Jan. 13, 1994. Section 225 requires compliance "to the extent possible," so presumably if Nextel demonstrates that compliance is not possible, it could request permission from the Commission not to comply with the provisions of Section 225. *See also* Section 64.604(a)(3) of the Commission's Rules, 47 C.F.R. § 64.604(a)(3).

[417] Communications Act, § 226, 47 U.S.C. § 226.

[418] S. Rep. No. 439. 101st Cong., 2d Sess. at 1 (1990). "Operator services" include collect or person-to-person calls, calls billed to a third number, and calls billed to a calling card or credit card. These services may be provided by an automated device as well as by a live operator. *Id.*

[419] *See id.* at 2.

charges and collection practices.[420] Aggregators are required to post on or near the phone, the name, address, and toll-free telephone number of the OSP.[421]

211. No commenter has demonstrated how forbearing from applying TOCSIA to CMRS providers who are also either OSPs or aggregators would be consistent with the public interest. The chief objectives of TOCSIA are to protect consumers from unfair or deceptive practices by OSPs and to ensure that consumers have the opportunity to make informed choices in making such calls.[422] The informational tariff filings required under TOCSIA are much less detailed than those required pursuant to Section 203. Therefore, we will not forbear from requiring CMRS providers to comply with Section 226 if it is applicable to them.[423]

212. Section 227 lists restrictions on the use of auto-dialing equipment, and limits the ability of telemarketers to harass consumers who do not seek their services. Congress enacted this provision in order to protect residential telephone subscribers' privacy by banning the use of automated or prerecorded telephone calls except when the receiving party consents, or in the case of an emergency.[424] Most commenters agree that application of this section to CMRS providers and calls placed over their networks will offer a significant protection for consumers. Competition has little relevance in deciding whether to use auto-dialing equipment in a marketing effort. Those commenters that urge forbearance do not provide sufficient information to satisfy the forbearance test in Section 332(c)(1)(A). Therefore, we will not forbear from enforcing Section 227.[425]

213. Section 228 regulates offerings of pay-per-call services. Section 228 requires carriers, *inter alia*, to maintain lists of information providers (IPs) to whom they assign a telephone number, to provide a short description of the services the IPs offer, and a statement of the cost per minute or the total cost for each service.[426] Those commenters asserting that the Commission should forbear from enforcing Section 228 do not provide the information required by Section 332(c)(1)(A) to justify forbearance. Further, enforcement of this section, while not imposing any unreasonable burden or cost on CMRS providers, provides an important consumer protection. Consequently, we will not forbear from enforcing Section 228.

5. *Safeguards for Affiliates of Dominant Landline Carriers*

a. Background and Pleadings

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[420] Communications Act, §§ 226(b), 226(c), 47 U.S.C. §§ 226(b), 226(c).

[421] *See id.*, § 226(c)(1)(A), 47 U.S.C. § 226(c)(1)(A).

[422] *See id.*, §§ 226(d)(1)(A), 226(d)(1)(B), 47 U.S.C. §§ 226(d)(1)(A), 226(d)(1)(B).

[423] *See also TOCSIA Declaratory Ruling*. GTE, Watercom, and In-Flight have filed petitions for reconsideration of this decision, or for alternative relief or waiver. The specific claims of these commenters will be addressed in the context of the reconsideration or waiver proceeding referenced herein.

[424] *See* Pub.L. 102-243, § 2.

[425] The constitutionality of portions of Section 227 has been questioned. We note that one court has declared Section 227(b)(1)(B) of the Act unconstitutional. *See* Moser v. FCC, 826 F.Supp. 360 (D.Or. 1993), *appeal pending*. There also is currently pending a lawsuit in which the plaintiff asserts that Section 227(b)(1)(C) is unconstitutional. *See* Destination Ventures v. FCC, Civil No. 93-737 AS (D.Or. 1993).

[426] *See* Communications Act, § 228(c), 47 U.S.C. § 228(c).

214. In the *Notice* we noted that some CMRS providers will be affiliated with dominant common carriers. We remarked that in other circumstances, when we have refrained from regulating certain services provided by affiliates of dominant landline common carriers, we have required compliance with safeguards to ensure that the dominant landline carrier does not act anti-competitively or harm ratepayers of regulated services.[427] We sought comment on whether we should impose any similar requirements on dominant landline common carriers with CMRS affiliates prior to applying forbearance to those affiliates.

215. Cox, Comcast, and Nextel argue that the Commission should place additional safeguards on CMRS affiliates of dominant carriers.[428] Cox and Nextel urge that separate subsidiaries for all LEC commercial mobile radio services activities are essential to minimize opportunities for cross-subsidization and anti-competitive behavior.[429] Nextel argues that the provision of local landline, cellular, intraLATA services, and in some instances interLATA, intrastate telephone service by some Bell Operating Companies creates a potential for anti-competitive discrimination to the detriment of competing CMRS providers.[430] PA PUC argues that the record does not support the removal of the existing structural separation requirements, and states that cellular and PCS should be treated similarly.[431]

216. Bell Atlantic contends that the Commission should scrutinize the accounting rules, but claims that such a review is beyond the scope of this proceeding.[432] In the interim, Bell Atlantic contends that the current accounting rules should apply to all CMRS providers, and the structural separation requirement of Section 22.901 of the Commission's Rules,[433] should be applied to all cellular affiliates of dominant carriers, particularly AT&T.[434] Bell Atlantic argues that, in the interest of parity, the Commission should, at a minimum, add AT&T and other dominant carriers to the list of companies identified in Section 22.901(b).[435] MCI agrees that

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[427] *See* Sections 32.27 and 64.902 of the Commission's Rules, 47 C.F.R. §§ 32.27, 64.902; Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities & Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies To Provide for Nonregulated Activities and To Provide for Transactions Between Telephone Companies and Their Affiliates, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1987), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell v. FCC, 896 F.2d 1978 (D.C.Cir. 1990).

[428] Cox Comments at 6; Comcast Comments at 14; Nextel Comments at 23; Nextel Reply Comments at 11. *See also* GCI Comments at 3; GCI Reply Comments at 3; MMR Reply Comments at 6 (urging the Commission not to forbear from tariff regulation for commercial mobile radio service providers affiliated with dominant carriers, especially any maritime carrier affiliated with a landline carrier). *See also* New York Comments at 10; PA PUC Reply Comments at 16 (arguing for differential treatment for commercial mobile radio service providers affiliated with dominant carriers).

[429] Cox Comments at 6-8; Nextel Comments at 23-24.

[430] Nextel Comments at 23-24.

[431] PA PUC Reply Comments at 16 n.36.

[432] Bell Atlantic Comments at 36.

[433] 47 C.F.R. § 22.901.

[434] Bell Atlantic Comments at 36-38. Bell Atlantic urges that, in the alternative, the Commission should repeal Section 22.901 of the Commission's Rules.

[435] *Id.* at 39.

this issue needs to be addressed, but urges that its resolution be handled in other proceedings or deferred until after the conclusion of the initial phase of this rule making.[436]

217. AMSC, NYNEX, Pacific, and Rochester contend that the Commission should not place additional safeguards on CMRS affiliates of dominant carriers.[437] AMSC asserts that the decision to place any safeguards on these carriers should be made on a case-by-case basis, with a particular focus on the market power of the CMRS provider and the potential for abuse that may arise from its relationship with the dominant carrier.[438] NYNEX and Pacific assert that the Commission should follow its approach in the PCS proceeding, in which the Commission rejected the imposition of additional cost accounting or separate subsidiary rules on LECs that provide PCS services.[439] NYNEX also argues that Nextel's proposal is self-serving, with the intent to protect its wide-area SMR services from competition.[440] OPASTCO contends that such regulatory burdens would curb the development of commercial mobile radio services in areas served by small and rural companies, noting that no additional burdens were placed on LECs that provide PCS.[441]

b. Discussion

218. In the *Broadband PCS Order* the Commission decided to impose accounting safeguards, but not structural separation, for PCS providers affiliated with local exchange carriers, including the Bell Operating Companies.[442] These rules require separation of costs incurred by a local exchange carrier from those incurred by its non-regulated affiliates, and accounting for local exchange carrier transactions with affiliates.[443] These safeguards are necessary because they help to ensure that costs of non-regulated affiliates are not passed to and included as costs of the local exchange carrier. For the same reason we will apply to all CMRS providers with local exchange carrier affiliates the same accounting safeguards that were adopted by the Commission in the PCS proceeding. We decline, however, to address the cellular structural separation requirements for the Bell Operating Companies. This issue was not contained in the *Notice* and evaluation of Section 22.901 of the Commission's Rules is an undertaking that would require a separate rule making. Moreover, there is not enough information in the record to evaluate whether we should remove these safeguards.

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[436] MCI Reply Comments at 6. *See also* USTA Reply Comments at 7 (to provide regulatory parity, the Commission should eliminate other regulatory barriers, such as separate subsidiary requirements, currently imposed upon exchange carriers).

[437] AMSC Comments at 4 n.5; NYNEX Comments at 21; Pacific Comments at 17; Pacific Reply Comments at 5, 8; Rochester Comments at 8-9; Rochester Reply Comments at 5. *See also* GTE Reply Comments at 11-12; PRTC Reply Comments at 6-8; Southwestern Reply Comments at 12-15; Sprint Reply Comments at 7; USTA Reply Comments at 6; US West Reply Comments at 16-17.

[438] AMSC Reply Comments at 4 n.5.

[439] NYNEX Comments at 21; Pacific Comments at 17-18, *citing Broadband PCS Order*, 8 FCC Rcd at 7751-52 (para. 126).

[440] NYNEX Reply Comments at 18-19.

[441] OPASTCO Reply Comments at 3-4, *citing Broadband PCS Order*, 8 FCC Rcd at 7751-52 (para. 126).

[442] *Broadband PCS Order*, 8 FCC Rcd at 7751-52 (para. 126).

[443] *See* Part 32 and Part 64 of the Commission's Rules, 47 C.F.R. Parts 32, 64.

219. The issues raised by commenters regarding accounting, structural separation, and other safeguards address important questions with regard to steps that should be taken to promote a competitive commercial mobile radio services environment in which the various market participants, including both established service providers and new entrants, and including both large and small carriers, have a fair opportunity to compete for new customers and in the development of new services. We believe that the Commission can play a positive role in fostering this competitive environment by examining and establishing the proper mix of safeguards designed to ensure that no CMRS provider gains an unfair competitive advantage resulting from its size or its preexisting position in particular CMRS markets. Thus, the issue of regulatory symmetry in the application of these safeguards is an important one. Although we defer this issue to a separate proceeding, we draw attention here to the fact that we recognize the importance of the decisions we must make in examining these issues.

F. Other Issues

1. *Interconnection Obligations*

a. Background and Pleadings

220. The Budget Act requires the Commission to respond to the request of any person providing commercial mobile radio service, and if the request is reasonable, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of the Communications Act. This provision does not limit or expand the Commission's authority to order interconnection pursuant to the Act.[444] The *Notice* requested comment on the rights of CMRS providers and PMRS licensees to demand interconnection with common carriers. We explained that the Commission has previously addressed the application of its Section 201 authority to require local exchange carriers (LECs) to interconnect with Part 22 licensees. The *Notice* tentatively concluded that there should be no distinction between the interconnection rights of Part 22 licensees and those of CMRS providers. The *Notice* also tentatively concluded that, in the commercial mobile context, LEC provision of interstate and intrastate interconnection and the type of interconnection the LEC provides are inseverable. Therefore, we proposed to preempt state regulation of the right to interconnect and the type of interconnection. We did not propose to preempt state regulation of the interconnection rates charged by LECs.

221. The Commission requested comment on whether we should require CMRS providers to provide interconnection to other mobile service providers. The *Notice* also asked whether, under Section 332(c)(3) of the Act, state regulation of interconnection rates of CMRS providers is preempted. The *Notice* additionally sought comment on whether service providers using PCS spectrum to offer commercial mobile radio service should be subject to equal access obligations like those imposed on LECs.

222. The *Notice* tentatively concluded that the Commission's power to require common carriers to provide interconnection to PMRS providers is unaffected by the Budget Act. The Commission proposed that PCS licensees should have a federally protected right to interconnect with LEC facilities regardless of whether the PCS licensees are classified as commercial or private mobile radio service providers, and that inconsistent state regulation should be preempted. The Commission contended that the new legislation should not affect its original proposal that PCS providers be entitled to obtain interconnection of a type that is reasonable for the PCS system and no less favorable than that offered by the LEC to any other customer or carrier, but we asked for comment on this issue. The *Notice* requested comment on whether LECs should be required to file tariffs specifying interconnection rates applicable to PCS

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[444] Communications Act, § 332(c)(1)(B), 47 U.S.C. § 332(c)(1)(B).

providers. The Commission also indicated that we continue to believe that, with respect to the rates for interconnection, it is unnecessary to preempt state and local regulation at this time.

223. Commenters and reply commenters generally agree that the Commission should require LECs to interconnect with commercial mobile radio service providers in the same manner they interconnect with Part 22 licensees.[445] Several parties, however, argue that the interconnection obligations proposed in the *Notice* are insufficient and have not provided adequate interconnection for cellular carriers.[446] Others reply that these proposals are unnecessary or go beyond the scope of this rule making.[447] Commenters and reply commenters agree with the Commission's tentative conclusion to preempt state regulation of the right to intrastate interconnection and the right to specify the type of interconnection.[448] Most commenters also agree with the Commission's decision not to preempt state regulation of LEC interconnection rates.[449] Several parties, however, urge the Commission to preempt state regulation of LEC interconnection rates.[450]

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[445] Century Comments at 7; GTE Comments at 21; McCaw Comments at 31; MCI Comments at 2, 7; Motorola Comments at 20-21; NABER Comments at 17; NYNEX Reply Comments at 19-20; Rig Comments at 5-6; TDS Reply Comments at 4; Telocator Comments at 23; USTA Comments at 11; US West Comments at 31-32; Vanguard Comments at 18; *see also* Ameritech Comments at 10; Pactel Comments at 17; PageNet Comments at 25-26; RMD Comments at 8. ***But see*** BellSouth Comments at 35 (claiming that the Commission is obligated under Section 201 to evaluate each case on its merits).

[446] Comcast Comments at 6-10; Cox Comments at 2-4; GCI Comments at 4-5; MCI Comments at 3; Nextel Reply Comments at 14-15; *see also* Radiofone Reply Comments at 7 (urging that commercial paging services must receive interconnection of the same quality and on the same terms provided by the LECs to their own paging subsidiaries); Rig Comments at 6 & n.3 (describing dispute over whether Southwestern will provide direct inward dial service to Rig).

[447] Bell Atlantic Reply Comments at 11 n.16; BellSouth Reply Comments at 1-2; Pacific Reply Comments at 3; Rochester Reply Comments at 6; US West Reply Comments at 17-18; USTA Reply Comments at 7-8.

[448] AMTA Comments at 21; Comcast Comments at 11 n.13; Cox Comments at 2 n.3; CTIA Comments at 40; GCI Comments at 5; McCaw Comments at 32-33; NTCA Comments at 7; Nextel Comments at 24; NYNEX Reply Comments at 20-21; PageNet Comments at 26-29; Pacific Comments at 18; Pactel Paging Reply Comments at 5; Southwestern Comments at 29; TDS Reply Comments at 4; TRW Comments at 34-35; US West Comments at 30; Vanguard Comments at 18-19. ***But see*** California Comments at 9-10; NARUC Comments at 21 (suggesting that the Commission's preemption proposal is premature); PA PUC Reply Comments at 17-19.

[449] BellSouth Comments at 36; California Comments 10-11; CTIA Comments at 40-41; DC PSC Comments at 10; Nevada Reply Comments at 1-2; PA PUC Reply Comments at 17-18; Pacific Comments at 18; PRTC Reply Comments at 25; Rochester Reply Comments at 6 n.20; TDS Reply Comments at 5; US West Comments at 30; Vanguard Comments at 19.

[450] See GCI Comments at 5 (arguing that a State should be allowed to regulate interconnection rates only if the Commission grants it authority after notice and comment); Nextel Comments at 25-26 (claiming that the Commission has both the legal authority and sufficient justification to preempt State regulation of interconnection rates); PageNet Comments at 28 n.75 (contending that paging carriers may not be well suited for dual interconnection rate regulation because it is impossible to segregate interstate from intrastate calls); TRW Comments at 36 (asserting that the Commission should preempt State regulation of interconnection rates for inherently national or international services such as those provided

224. Commenters disagree over our proposal to require commercial mobile radio service providers to interconnect with other mobile service providers. Some commenters contend that the Commission should impose interconnection obligations on CMRS providers.[451] NCRA urges the Commission to require facilities-based CMRS providers to allow collocation consistent with the Commission's Expanded Interconnection proceeding[452] for local exchange carriers.[453] Many parties, however, argue that commercial mobile radio service providers do not have control over any monopoly, bottleneck facilities, and therefore no need exists to impose upon them any interconnection obligations.[454] In particular, several parties oppose MCI's proposal that CMRS providers give interexchange carriers access to customer information stored in mobile service data bases.[455] Reply commenters also oppose NCRA's proposal that the Commission impose expanded interconnection obligations on CMRS providers.[456] GTE points out that the Commission may defer considering whether commercial mobile radio service providers have an interconnection obligation and, if it appears that demand is not being met, revisit the issue.[457] Commenters also differ regarding the extent of state authority over a CMRS provider's interconnection obligations and interconnection rates. McCaw and Nextel argue that, in the interest of a uniform federal policy for commercial mobile radio service, the Commission should preempt states from imposing interconnection requirements on CMRS providers.[458] CTIA and McCaw contend that the Budget Act specifically preempts states from

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over MSS/RDSS systems).

[451] Ameritech Comments at 10 n.20; Bell Atlantic Comments at 40; GCI Comments at 4; Grand Comments at 2-3; MCI Comments at 10; NCRA Comments at 23; NYNEX Reply Comments at 19-23 ("However, new licensees or developing services should not be permitted to use interconnection as a substitute for the prompt construction and implementation of their own independent networks."); Pacific Comments at 19-20; USTA Comments at 11; US West Comments at 33-34. *But see* TDS Comments at 20 (arguing that the Commission should require commercial mobile service providers to provide interconnection to other mobile service providers only where necessary to assure that the operations of adjacent non-regional systems providing CMRS offerings in the same radio service have a fair opportunity to interconnect to promote regional roaming).

[452] *See* note 489, *infra*.

[453] NCRA Comments at 9-13.

[454] AllCity Comments at 2-3; Arch Comments at 8 n.20; CTIA Comments at 41-42; IVC Partnerships Comments at 2-3; McCaw Comments at 31-32; New Par Comments at 11-12; Nextel Reply Comments at 15; Pactel Comments at 10-11; Pactel Paging Comments at 6 n.13; PageNet Reply Comments at 2; PNC Comments at 4-5; Southwestern Comments at 29-30. *See also* BellSouth Comments at 36; Century Comments at 7; TRW Comments at 36 n.72; Vanguard Comments at 15-17.

[455] Pactel Reply Comments at 15-16; Southwestern Reply Comments at 9-10.

[456] Bell Atlantic Reply Comments at 11; CTIA Reply Comments at 21-22; Pacific Reply Comments at 2-3; Pactel Reply Comments at 14 n.38; Southwestern Reply Comments at 8; TDS Reply Comments at 5-6.

[457] GTE Comments at 22. *See also* Sprint Reply Comments at 7-8.

[458] McCaw Comments at 32-33; Nextel Reply Comments at 15-16. *See also* NCRA Comments at 23 (arguing that the possibility of State regulation must be kept open unless there is a federally mandated right of access on a cost basis to commercial mobile radio service providers); New Par Comments at 12-13 (asserting that if the Commission imposes interconnection obligations on commercial mobile radio service providers, it should preempt State authority to regulate such interconnection).

regulating the rates charged by a CMRS provider, including rates for interconnection.[459] Other parties, however, claim that Congress did not intend to preempt state regulation of the interconnection rates of CMRS providers, only the rates those providers charge to end users.[460]

225. Many parties support the Commission's determination that the Budget Act does not limit the Commission's authority to require common carriers to provide interconnection to private mobile radio service providers.[461] Some parties urge the Commission to clarify or strengthen the rights of private mobile radio service providers.[462] Several paging companies specifically argue that if common carrier paging is reclassified as PMRS, these mobile service providers should not lose their existing interconnection rights.[463] Other commenters and reply commenters argue that PMRS providers should not have the same interconnection rights as common carriers.[464]

226. Commenters also expressed opinions with respect to LEC obligations to interconnect with PCS providers specifically. Many parties support the proposal in the *Notice* that PCS licensees should have a federally protected right to interconnect with LEC facilities regardless of whether the PCS licensees are classified as commercial or private mobile radio service providers.[465] Several commenters urge the Commission to clarify or strengthen the interconnection rights of PCS providers.[466] Commenters agree with our proposal to preempt inconsistent state regulation of PCS interconnection.[467] MCI also supports our proposal not to preempt,

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[459] CTIA Comments at 41; New Par Comments at 13-14.

[460] NARUC Comments at 22-23; New York Comments at 12-14; Vanguard Comments at 19-20.

[461] AMTA Comments at 21; Celpage Comments at 4; RMD Comments at 8; Pagemart Comments at 10-11; PageNet Comments at 25-26.

[462] Motorola Comments at 21; NABER Comments at 17.

[463] Pagemart Comments at 10-11; PageNet Comments at 25-26; *see also* AmP Reply Comments at 4-5; Telocator Reply Comments at 10.

[464] Bell Atlantic Comments at 40-41; GTE Comments at 21-22; MCI Reply Comments at 4-5; US West Comments at 32-33. *See also* GTE Reply Comments at 13 (urging the Commission to defer judgment to allow market forces to take effect first); Nextel Comments at 25 n.44 (arguing that to the extent that private mobile radio service carriers require the same interconnection arrangements as a commercial mobile radio service, they are likely offering a functionally equivalent service and should be classified as a CMRS provider for regulatory purposes).

[465] Celpage Comments at 5; CTP Comments at 2; NCRA Comments at 23-24; Pacific Comments at 20; Pagemart Comments at 19; RMD Comments at 8; Telocator Comments at 23; Time Warner Comments at 7-10; TRW Comments at 35. *But see* MCI Reply Comments at 3-5 (questioning the Commission's authority to grant private carriers the same interconnection rights as commercial mobile radio service providers).

[466] Cox Comments at 3; GCI Comments at 4-5; MCI Comments at 8; Telocator Reply Comments at 10.

[467] CTP Comments at 2; Comcast Comments at 11; MCI Comments at 8; Pagemart Comments at 20; Time Warner Comments at 10.

at this time, state regulation of the rates LECs charge for PCS interconnection.[468] In addition, several parties support the Commission's proposal to require LECs to tariff rates for PCS interconnection.[469]

b. Discussion

227. The *Notice* refers to the right of mobile service providers, particularly PCS providers, to interconnect with LEC facilities. The "right of interconnection" to which the *Notice* refers is the right that flows from the common carrier obligation of LECs "to establish physical connections with other carriers" under Section 201 of the Act.[470] The new provisions of Section 332 do not augment or otherwise affect this obligation of interconnection.

228. Previously, the Commission has required local exchange carriers to provide the type of interconnection reasonably requested by all Part 22 licenses.[471] In the case of cellular carriers, the Commission found that separate interconnection arrangements for interstate and intrastate services are not feasible. Therefore, we concluded that the Commission has plenary jurisdiction over the physical plant used in the interconnection of cellular carriers and we preempted state regulation of interconnection. We found, however, that a LEC's rates for interconnection are severable because the underlying costs of interconnection are segregable. Therefore, we declined to preempt state regulation of a LEC's rates for interconnection. The Commission recognized, however, that the charge for the intrastate component of interconnection may be so high as to effectively preclude interconnection. This would negate the federal decision to permit interconnection, thus potentially warranting our preemption of some aspects of particular intrastate charges.[472]

229. The Commission has allowed LECs to negotiate the terms and conditions of interconnection with cellular carriers. We required these negotiations to be conducted in good faith. The Commission stated, "we expect that tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection."[473] We also preempted any state regulation of the good faith negotiation of the terms and conditions of interconnection between LECs and cellular carriers. The *Notice*, however, requested comment on whether we should require LECs to file tariffs specifying interconnection rates for PCS providers.

230. We see no distinction between a LEC's obligation to offer interconnection to Part 22 licensees and all other CMRS providers, including PCS providers. Therefore, the Commission will require LECs to provide reasonable and fair interconnection for all commercial

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[468] MCI Comments at 9; *see also* CTP Comments at 2 (contending that the Commission does not need to preempt the rate setting of a settlements process as long as the same process is used for independent telephone companies); Nevada Reply Comments at 1-3 (Commission preemption is neither necessary nor permissible). *But see* Pagemart Comments at 20 (urging preemption).

[469] Cox Comments at 5-6; CTP Comments at 1-2; Pagemart Comments at 19; *see also* Comcast Comments at 11-12 (urging the Commission to order LECs to submit sufficient information, such as intrastate interconnection tariffs and all contracts for interconnection and for billing and collection). *But see* Pacific Comments at 20 (opposing a federal tariff requirement).

[470] 47 U.S.C. § 201.

[471] *Interconnection Order*, 2 FCC Rcd at 2913.

[472] *Id.* at 2912.

[473] *Id.* at 2916.

mobile radio services. The Commission finds it is in the public interest to require LECs to provide the type of interconnection reasonably requested by all CMRS providers. The Commission further finds that separate interconnection arrangements for interstate and intrastate commercial mobile radio services are not feasible (*i.e.*, intrastate and interstate interconnection in this context is inseverable) and that state regulation of the right and type of interconnection would negate the important federal purpose of ensuring CMRS interconnection to the interstate network. Therefore, we preempt state and local regulations of the kind of interconnection to which CMRS providers are entitled.[474]

231. With regard to the issue of LEC intrastate interconnection rates, we continue to believe that LEC costs associated with the provision of interconnection for interstate and intrastate cellular services are segregable,[475] and, therefore, we will not preempt state regulation of LEC intrastate interconnection rates applicable to cellular carriers at this time. With regard to paging operations, PageNet and Pagemart argue that we should preempt state regulation of LEC rates charged to paging carriers for interconnection because LEC costs associated with such interconnection are not jurisdictionally segregable.[476] We do not find the arguments presented by PageNet and Pagemart to be persuasive, in light of the fact that our Part 22 Rules already have been applied to LEC interconnection rates for common carrier paging companies, as well as cellular companies, without any complaints.

232. In providing reasonable interconnection to CMRS providers, LECs shall be subject to the following requirements. First, the principle of mutual compensation shall apply, under which LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates on LEC facilities. Commercial mobile radio service providers, as well, shall be required to provide such compensation to LECs in connection with mobile-originated traffic terminating on LEC facilities. This requirement is in keeping with actions we already have taken with regard to Part 22 providers.[477]

233. Second, we require that LECs shall establish reasonable charges for interstate interconnection provided to commercial mobile radio service licensees. These charges should not vary from charges established by LECs for interconnection provided to other mobile radio service providers. In a complaint proceeding, under Section 208 of the Act, if a complainant shows that a LEC is charging different rates for the same type of interconnection, then the LEC shall bear the burden of demonstrating that any variance in such charges does not constitute an unreasonable discrimination in violation of Section 202(a) of the Act.

234. Third, in determining the type of interconnection that is reasonable for a commercial mobile radio service system, the LEC shall not have authority to deny to a CMRS provider any form of interconnection arrangement that the LEC makes available to any other carrier or other customer, unless the LEC meets its burden of demonstrating that the provision of such interconnection arrangement to the requesting commercial mobile radio service provider either is not technically feasible or is not economically reasonable.

235. Although we requested comment on whether LECs should tariff interconnection rates for PCS providers only, our experience with cellular interconnection issues and our review

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[474] *See Louisiana PSC*, 476 U.S. at 375 n.4; Maryland Pub. Serv. Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); *NARUC II*; *Texas PUC*; *NCUC I; NCUC II*.

[475] *See Interconnection Order*, 2 FCC Rcd at 2912.

[476] PageNet Comments at 28 n.75; Pagemart Comments at 12.

[477] *See Interconnection Order*, 2 FCC Rcd at 2915.

of the comments have convinced us that our current system of individually negotiated contracts between LECs and Part 22 providers warrants review and possible revision.[478] We believe that commercial mobile radio service interconnection with the public switched network will be an essential component in the successful establishment and growth of CMRS offerings. From the perspective of customers, the ubiquity of such interconnection arrangements will help facilitate the universal deployment of diverse commercial mobile radio services. From a competitive perspective, the LECs' provision of interconnection to CMRS licensees at reasonable rates, and on reasonable terms and conditions, will ensure that LEC commercial mobile radio service affiliates do not receive any unfair competitive advantage over other providers in the CMRS marketplace. Therefore, we intend to issue a Notice of Proposed Rule Making requesting comment on whether we should require LECs to tariff all interconnection rates.[479]

236. Although we requested comment on whether to impose equal access obligations on PCS providers, the Budget Act does not require us to make such a determination within any statutory deadline. Because this issue also arises in a pending petition for rule making filed by MCI[480] regarding equal access obligations for cellular service providers, we believe it is more efficient to defer any final decision in this area and to address these issues in the context of the MCI petition.

237. The *Notice* also requested comment on whether we should require CMRS providers to provide interconnection to other carriers. As commenters point out, our analysis of this issue must acknowledge that CMRS providers do not have control over bottleneck facilities. In addition, we note that the relatively few complaints the Commission has received concerning cellular carriers' denial of interconnection have involved allegations that cellular carriers refused to allow resellers to interconnect their own facilities with those of cellular carriers under reasonable or non-discriminatory terms and conditions.[481] This situation may change as more competitors enter the CMRS marketplace. In particular, PCS providers may wish to interconnect with cellular facilities, or vice versa, which could also allow for the advantages of interconnecting with a LEC. Also, we do not wish to encourage a situation where most commercial traffic must go through a LEC in order for a subscriber to send a message to a subscriber of another commercial mobile radio service. Because the comments on this issue are so conflicting and the complexities of the issue warrant further examination in the record, we have decided to explore this issue in a Notice of Inquiry. This proceeding will address many of the related issues raised by commenters. For example, MCI raises the issue of whether CMRS providers' interconnection obligations include providing access to mobile location data bases, and providing routing

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[478] *See, e.g.*, Comcast Comments at 6-10; Cox Comments at 2-4; GCI Comments at 4-5; MCI Comments at 3; Rig Comments at 6 & n.3.

[479] This *Notice* may also request comment on whether we should mandate specific tariff rate elements and, if so, how these rate elements should be structured, or whether we should apply alternative requirements on LECs that would ensure reasonable interconnection charges for CMRS providers.

[480] MCI Telecommunications Corp., Policies and Rules Pertaining to Equal Access Obligations of Cellular Licensees, Petition for Rule Making, RM-8012, filed June 2, 1992. We note that the federal court having jurisdiction over the Modification of Final Judgment in the Bell System divestiture proceeding may be asked to determine whether equal access obligations attach to GTE's or the Bell Operating Companies' offering of PCS.

[481] *See, e.g.*, Continental Mobile Tel. Co. v. Chicago SMSA Limited Partnership, File No. E-92-02 (filed Oct. 9, 1991); Cellnet Communications, Inc. v. Detroit SMSA Limited Partnership, File No. 91-95 (filed Mar. 6, 1991).

information to interexchange carriers and other carriers.[482] We agree, however, with commenters who say that the statutory language is clear, that if we do require interconnection by all CMRS providers, the statute preempts state regulation of interconnection rates of CMRS providers.[483]

238. The Notice of Inquiry will also allow the Commission to explore the issue of resale of commercial mobile radio service. NCRA raises the issue of CMRS providers' interconnection obligations to resellers. Several commenters also question whether the Commission should require CMRS providers to allow facilities-based competitors to resell their services. The Commission has a long history of dealing with issues relating to resellers.[484] Our policy has been to prohibit wireline common carriers and cellular carriers from denying service to resellers.[485] In the case of cellular, however, the Commission has allowed a cellular carrier to deny resale to its facilities-based competitor in the same market after that competitor's five-year fill-in period has expired.[486] The Commission reasoned that requiring resale to a facilities-based competitor would discourage cellular licensees from building out their own systems.[487] While these issues are pending before us, we will continue our resale policy with respect to cellular CMRS providers. Our Notice of Inquiry will explore whether we should require all CMRS licensees to provide resale to those who are non-facilities based competitors in the licensees' service area as well as to facilities-based competitors that have held licenses less than five years.

239. In addition, we requested comments on whether we should require local exchange carriers to interconnect with PMRS licensees. Although Section 201(a) of the Act provides the Commission with explicit jurisdiction to require carriers to "establish physical connections with other carriers," and there is no similar provision for interconnection with non-carriers, this does not preclude the Commission's ability to create a right to interconnection for PMRS licensees.[488] In this regard, we conclude that if a complainant shows that a common carrier provides interconnection to CMRS licensees while denying interconnection of the same type and at the same rate to PMRS licensees, the carrier will bear the burden of establishing why this would not constitute denial of a reasonable request for service in violation of Section 201(a),

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[482] *See* MCI Comments at 10. We note that these issues are being explored for dominant carriers in the Commission's Intelligent Network proceeding. *See* Intelligent Networks, CC Docket No. 91-346, Notice of Proposed Rule Making, 8 FCC Rcd 6813 (1993).

[483] Communications Act, § 332(c)(3), 47 U.S.C. § 332(c)(3).

[484] *E.g.*, Resale and Shared Use of Common Carriers Services and Facilities, Docket No. 20097, Report and Order, 60 FCC 2d 261 (1976), *modified on other grounds*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, CC Docket No. 80-54, Report and Order, 83 FCC 2d 167 (1980); Cellular Communications Systems, CC Docket No. 79-318, Report and Order, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

[485] See Commission decisions cited in note 484, *supra*.

[486] Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, CC Docket No. 91-33, Report and Order, 7 FCC Rcd 4006 (1992).

[487] *Id.* at 4007-08.

[488] *See, e.g.*, *Texas PUC*, 886 F.2d 1325, 1327-35 (D.C.Cir. 1989); Fort Mill Tel. Co. v. FCC, 719 F.2d 89, 92 (4th Cir. 1983); *NCUC I*, 537 F.2d at 794-795; Hush-A-Phone Corp. v. United States, 238 F.2d 266, 269 (D.C.Cir. 1956); AT&T, 71 FCC 2d 1, 10-11 (1979).

establishment of an unreasonable condition of service in violation of Section 201(b), and unreasonable discrimination in violation of Section 202(a).[489] We also note that if a service classified as PMRS is provided for profit and made available to the public, interconnection would bring the service within the definition of a CMRS because the definition of interconnected service includes "service for which a request for interconnection is pending pursuant to subsection (c)(1)(B)."[490]

2. *State Petitions To Extend Rate Regulation Authority*

a. Background and Pleadings

240. The statute preempts state and local rate and entry regulation of all commercial mobile radio services, effective August 10, 1994.[491] Under Section 332(c)(3)(B), however, any state that has rate regulation in effect as of June 1, 1993, may petition the Commission to extend that authority based on a showing that (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State." [492]

241. Section 332(c)(3)(B) of the revised statute further provides that the Commission must complete all actions on such petitions, including reconsideration, within 12 months of submission. Under Section 332(c)(3)(A) of the revised statute, states may also petition the Commission to initiate rate regulation, based on the criteria noted above, if no such rate regulation has been in effect in the state involved.[493] If the Commission authorizes state rate regulation under either procedure, interested parties may, after a "reasonable time," petition the Commission to suspend the regulations.[494] In the *Notice* we indicated that we intended to establish procedures for the filing of such petitions by the states and interested parties, and we sought comments on what factors should be considered in establishing such procedures.

242. Most of the commenters point out that Section 332(c)(3)(A) is clear as to the congressional intent to preempt State and local rate and entry regulation of commercial mobile

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[489] *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rule Making, 7 FCC Rcd 7369, 7472-73 (1992), *appeal pending sub nom.* Bell Atlantic Corp. v. FCC, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992), *recon.*, 8 FCC Rcd 127 (1992), *further recon.*, 8 FCC Rcd 7341 (1993), Second Report and Order and Third Notice of Proposed Rule Making, 8 FCC Rcd 7374 (1993). We note that the Commission may not forbear regarding the requirements of Sections 201, 202, and 208 of the Act. *See* Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[490] Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

[491] Budget Act, § 6002(c)(2)(A).

[492] Communications Act, § 332(c)(3)(A)-(B), 47 U.S.C. § 332(c)(3)(A)-(B). States must file such petitions prior to August 10, 1994. Communications Act, § 332(c)(3)(B), 47 U.S.C. § 332(c)(3)(B).

[493] Communications Act, § 332(c)(3)(A), 47 U.S.C. § 332(c)(3)(A). The Commission must allow public comment on any such petition and must grant or deny the petition within nine months of submission.

[494] The Commission must allow public comment on any such petition and grant or deny the petition in whole or in part within nine months of the date of submission. Communications Act, § 332(c)(3)(B), 47 U.S.C. § 332(c)(3)(B).

radio services, the narrow circumstances under which the states may be permitted to petition the Commission for authority to continue or initiate CMRS rate regulation, and the criteria upon which they must base their petitions.[495] These commenters believe that the state should bear the burden of proving that rate regulation of commercial mobile radio service providers is justified because of significant market failures. In this regard, GTE urges the Commission to establish a strong presumption against the imposition or continuation of state regulation where there are multiple CMRS providers. Citing the legislative history, it argues that this presumption would further the congressional intent that states not be permitted to regulate commercial mobile radio service, even when provided for basic telephone service, where "several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service."[496]

243. Several of the commenters assert that the Commission must adopt specific procedures regarding the threshold showing that the states must make in order to justify rate regulation of commercial mobile radio services.[497] With respect to petitions filed by any state seeking to demonstrate that prevailing market conditions will not protect CMRS subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory, McCaw contends that the states must demonstrate through empirical evidence that (1) market conditions vary from national norms; (2) CMRS carriers have engaged in anti-competitive behavior which has resulted in harm to consumers; and (3) ad hoc regulation is a better means of protecting consumers than a uniform federal policy.[498]

244. Bell Atlantic argues that, in accordance with Section 332(c)(3), the Commission should adopt procedures that ensure that the petition authorized by Section 332 is in fact filed on behalf of the state itself. Thus, the sponsor of a state petition should demonstrate that it is duly authorized by order or consent of all interested state agencies or departments or, preferably, by state legislation directing the appropriate agency to file the petition.[499] In addition, Bell Atlantic argues that the state petition should identify the specific existing or proposed rules that the state wishes to have imposed on CMRS providers. Such disclosure will allow all interested parties fair notice of the specific rules that the states may apply to them should the petition be granted.[500]

245. Several of the commenters argue that any state regulation that is permitted should be narrowly tailored in terms of scope and duration to remedy the identified market breakdown and to protect consumers. In addition, the commenters argue that states should be permitted to regulate comparable mobile services differently only to the extent that the Commission has established separate regulatory classifications of CMRS providers.[501]

246. A small number of commenters favor the adoption of more liberal procedures that would enable the states to regulate rates. Initially, NARUC and DC PSC contend that the language in the second prong of the statutory showing concerning existing market conditions

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[495] *See, e.g.*, McCaw Comments at 23; CTIA Comments at 38; GTE Comments at 24; Rochester Comments at 10.

[496] GTE Comments at 24-25, *quoting* Conference Report at 493.

[497] *See* Bell Atlantic Comments at 42-43; McCaw Comments at 24-25.

[498] McCaw Comments at 23.

[499] Bell Atlantic Comments at 41-42.

[500] *Id.* at 42-43.

[501] GTE Comments at 25; McCaw Comments at 24; Century Comments at 38.

cannot be read literally because such a showing is the basis for granting the petition under the first prong of the statutory showing.[502] DC PSC notes that the statute specifies that a state need meet only one of the two clauses, and the legislative history does not indicate any intent to limit a state petition based on a claim that the new service was a substitute for an existing service by a requirement that certain market conditions exist.[503]

247. DC PSC proposes that states may file a petition at any time showing: "(1) that 15 percent of basic service subscribers in any telephone exchange area do not have access to basic services offered from any telephone company other than a commercial mobile service licensee, (2) that the rates for basic services offered by the commercial mobile service provider are higher than the rates of the pre-existing landline carrier, or (3) that the commercial mobile service provider has market power in a relevant market."[504] DC PSC recommends that the proceeding should provide for public notice and comment within 30 days and a response within 15 days by the state.[505] According to DC PSC, the Commission should grant the petition if either of the first two tests is met. Otherwise, the Commission should exercise its judgment to evaluate a showing based on the third test. Finally, DC PSC argues that petitions to eliminate state regulations after a state petition is granted should not be permitted for a period of three years. Nevada concurs with DC PSC's proposal.[506] It believes that the use of DC PSC's proposed three-pronged test will allow the Commission to consider the monopoly power of commercial mobile radio service providers within specific market areas, not for the state as a whole.

248. In addition, NARUC, PA PUC, and New York believe that the Commission should not adopt rigid criteria for state petitions filed with the Commission. PA PUC maintains that the criteria adopted in the statute are clear, and given the states' interests involved, the states should be allowed to set forth in their petitions any factors they consider relevant.[507] NCRA proposes that the Commission adopt a review standard that is sufficiently generous to "assure that local and state interests continue to exercise their state statutory duties."[508] Finally, New York argues that the Commission may not preempt states from rate regulating CMRS unless it is satisfied that consumers in the telecommunications market have the ability to choose among CMRS services offered by several entities, and no entity or combination of entities has the ability to control the market prices of these services.[509]

249. Bell Atlantic and Southwestern disagree with DC PSC's proposal.[510] Bell Atlantic emphasizes that the statute and the legislative history make clear that substitution of wireless for wireline service is not sufficient to warrant state rate regulation. Rather, the states must also show that there is inadequate competition in the provision of commercial mobile service. Thus, it rejects DC PSC's proposal to allow state regulation whenever 15 percent of basic service

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[502] DC PSC Comments at 10-11; NARUC Comments at 5-6.

[503] DC PSC Comments at 11.

[504] *Id.* at 12.

[505] *Id.*

[506] Nevada Reply Comments at 4-5. Nevada proposes that the first test suggested by DC PSC be amended slightly to replace the term "telephone exchange area" with the word "area." *Id.* at 5.

[507] PA PUC Reply Comments at 22.

[508] NCRA Comments at 24-25.

[509] New York Comments at 15.

[510] Bell Atlantic Reply Comments at 12-15; Southwestern Reply Comments at 15-17.

subscribers receive such service from CMRS providers. It also rejects DC PSC's proposal to require a grant of a state petition whenever a CMRS provider's rates for basic service are higher than rates for landline service because a comparison of wireless to wireline rates in no way shows that the wireless market is not competitive.[511] Southwestern disagrees with DC PSC's test concerning market power of CMRS providers in a particular CMRS market. It notes that DC PCS does not explain how it would measure market power or whether the states would have to demonstrate that such power had an actual adverse effect on rates.[512] Finally, Bell Atlantic believes that the proposal to impose a three-year period before parties may seek to repeal state regulations is misguided. Those time frames, Bell Atlantic asserts, will depend on such factors as the extent of rate regulation granted, conditions in the state, and how rapidly conditions change.[513]

b. Discussion

250. We believe that Congress, by adopting Section 332(c)(3)(A) of the Act, intended generally to preempt state and local rate and entry regulation of all commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest. We also agree with the commenters that Section 332(c)(3) is clear as to the circumstances under which states may be permitted to petition the Commission for authority to regulate rates for CMRS and the criteria upon which they must base their petitions.

251. With respect to all petitions filed by the states under Section 332, we agree with the commenters that any such petition should be acceptable only if the state agency making such filing certifies that it is the duly authorized state agency responsible for the regulation of telecommunications services provided in the state. With respect to petitions seeking to demonstrate that prevailing market conditions will not protect CMRS subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory, we agree with the parties who argue that the states must submit evidence to justify their showings. Any state filing a petition pursuant to Section 332(c)(3) shall have the burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates. In any event, interested parties will be allowed to file comments in response to these petitions within 30 days after public notice of the filing of the petition. The comments should also be based on evidence that can rebut the showing made in the petition. Any interested party may file a reply within 15 days after the time for filing comments in response to the petition has expired. If we determine that the state has failed to meet this burden of proof, then we will deny the petition.

252. We agree with the commenters that a state should have discretion to submit whatever evidence the state believes is persuasive regarding market conditions in the state and the lack of protection for CMRS subscribers in the state. As a general matter, we would consider the following types of evidence, information, and analysis to be pertinent to our examination of market conditions and consumer protection:

(1) The number of CMRS providers in the state, the types of services offered by these providers, and the period of time during which these providers have offered service in the state.

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[511] Bell Atlantic Reply Comments at 12-13.

[512] Southwestern Reply Comments at 17.

[513] Bell Atlantic Reply Comments at 14.

(2) The number of customers of each such provider, and trends in each provider's customer base during the most recent annual period (or other reasonable period if annual data is not available), and annual revenues and rates of return for each such provider.

(3) Rate information for each CMRS provider, including trends in each provider's rates during the most recent annual period (or other reasonable period if annual data is not available).

(4) An assessment of the extent to which services offered by the CMRS providers that the state proposes to regulate are substitutable for services offered by other carriers in the state.

(5) Opportunities for new entrants that could offer competing services, and an analysis of existing barriers to such entry.

(6) Specific allegations of fact (supported by an affidavit of a person or persons with personal knowledge) regarding anti-competitive or discriminatory practices or behavior on the part of CMRS providers in the state.

(7) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, imposed upon CMRS subscribers. Such evidence should include an examination of the relationship between rates and costs. We will consider especially probative the demonstration of a pattern of such rates, if it also is demonstrated that there is a basis for concluding that such a pattern signifies the inability of the CMRS marketplace in the state to produce reasonable rates through competitive forces.

(8) Information regarding customer satisfaction or dissatisfaction with services offered by CMRS providers, including statistics and other information regarding complaints filed with the state regulatory commission.

In addition to the above-described evidence, information, and analysis that a state may submit in connection with its petition, we conclude that a state must identify and provide a detailed description of the specific existing or proposed rules that it would establish if we were to grant its petition.

253. With respect to petitions filed by any state seeking to demonstrate that state rate regulation is appropriate because the commercial mobile radio service is a replacement for landline telephone exchange service for a substantial portion of the telephone land line exchange service provided within the state, we disagree with DC PSC's argument that the language of the statute cannot be read literally to require states to demonstrate that market conditions are such that customers are not protected from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory. As the legislative history points out:[514]

> If, however, several companies offer radio service as a means of providing basic service in competition with each other such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that states should be permitted to regulate these competitive services simply because they employ radio as a transmission means.

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[514] Conference Report at 493.

We agree with the other commenters that such petitions must demonstrate both that market conditions are such that they do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and a substantial portion of the CMRS subscribers in the state or a specified geographic area have no alternative means of obtaining basic telephone service. Thus, we will require the state to provide such information as may be necessary to enable us to determine market conditions prevalent in the state and the range of basic telephone service alternatives available to consumers in the state.

254. Similarly, petitions to suspend state rate regulation must be based on recent empirical data or other significant evidence. Finally, as to what constitutes a "reasonable time" for interested parties to file such petitions with the Commission, we agree with those commenters who state that parties should not be allowed to file such petitions until the state has had an opportunity to implement rate regulation and make the necessary adjustments. We disagree, however, with the DC PSC and others who seek to adopt a period of three years before parties may challenge state regulations. Rather, we believe that an 18-month period should provide the states with adequate time to implement rate regulation. Such a period will afford the states as well as interested parties sufficient opportunity to assess the impact of rate regulation on market conditions and the provision of services to consumers. Therefore, interested parties may not file petitions to suspend state rate regulation until 18 months after such regulatory authority has been granted or extended.

255. In any event, interested parties will be allowed to file comments in response to these petitions (*i.e.*, petitions filed by parties seeking to discontinue state regulation) within 30 days after public notice of the filing of the petition. The comments should also be based on evidence that can rebut the showing made in the petition. Any interested party may file a reply within 15 days after the time for filing comments has expired.

256. We point out that the standards for preemption established in *Louisiana PSC* do not apply to the rules adopted today.[515] In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising federal jurisdiction with respect to "'charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services.'"[516] Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

257. We emphasize that the rules adopted today do not prohibit the states from regulating other terms and conditions of commercial mobile radio service.[517] Finally, we also note that in those cases where the Commission authorizes the state to regulate rates for commercial mobile radio services, such regulations will be authorized only for the specified period of time we find

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[515] Under *Louisiana PSC*, the Commission may preempt State regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. *Louisiana PSC*, 476 U.S. at 375 n.4. In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the State regulation thwarts or impedes a valid Federal policy. *See NARUC II*; Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[516] *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).

[517] As explained in note 515, *supra*, if we determine that a State's regulation of other terms and conditions of jurisdictionally mixed services thwarts or impedes our federal policy of creating regulatory symmetry, we would have authority under *Louisiana PSC* to preempt such regulation.

to be necessary to ensure that rates will be neither unjust nor unreasonably discriminatory.[518] We will make such determination on a case-by-case basis at the time regulatory authorization is extended to a petitioning state. To the extent that such rulings are made, they will remain in effect until such time as circumstances dictate.

3. *Miscellaneous Issues Raised by Commenters*

258. UTC expresses the view that Commission reorganization is a "necessary element" in carrying out the requirements of the Budget Act, and then goes on to propose a "conversion" plan under which the Commission would be reorganized with regard to our administration of non-broadcast radio services.[519] We did not seek comment on the issue advanced by UTC. While this would not preclude us from reaching the issue,[520] we have chosen not to propose or pursue Commission reorganization in this rule making.

259. NARUC suggests that the Commission and the states should work together to develop methods to monitor mobile services for purposes of determining whether particular services classified as private continue to be entitled to that classification. NARUC also proposes that the Commission and the states should agree to the provision of "complete reciprocal access to information" relevant to mobile service monitoring.[521] We agree with NARUC that state and federal cooperation regarding methods of monitoring the manner in which services are provided by mobile service carriers is reasonable, and we believe that such cooperation can improve monitoring efforts. We further agree with NARUC that state and federal cooperation could address issues such as reciprocal access to mobile service monitoring information. As an initial step toward a cooperative effort, we are committed to meeting informally with NARUC's Communications Committee.

260. Hardy requests that we clarify how the new regulatory scheme would apply to services provided over FM subcarrier channels, including PCS service.[522] We currently allow subsidiary communication services transmitted on a subcarrier within the FM baseband signal. Under our rules, subsidiary communication services that are common carrier services in nature are subject to common carrier regulation.[523] FM subcarriers may offer a variety of services.[524] Any mobile services provided over FM subcarriers that fall within the definition of CMRS and were previously subject to common carrier regulation will now be regulated as CMRS. Mobile services provided over FM subcarriers that meet the definition of CMRS but have been regulated as private radio services, will receive the benefit of our transition rules before becoming subject to CMRS rules. Finally, mobile services provided over FM subcarriers that do not meet the definition of CMRS will be regulated as PMRS.

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[518] Communications Act, § 332(c)(3)(B), 47 U.S.C. § 332(c)(3)(B).

[519] UTC Comments at 19. *See also* AMTA Comments at 16 n.4. UTC also revisits its proposal in its reply comments. UTC Reply Comments at 23-24.

[520] We are not required to give any notice before adopting a rule of Commission organization. 5 U.S.C. § 553(b)(3)(A).

[521] NARUC Comments at 11-12.

[522] Hardy Comments at 1-2.

[523] *See* Section 73.295 of the Commission's Rules, 47 C.F.R. § 73.295.

[524] These services include: functional music, specialized foreign language programs, radio reading services, utility load management, market and financial data and news, paging and calling, traffic control signal switching, bilingual television audio, and point-to-point or multipoint messages. *See id.*

261. RMD asks whether foreign governments and their representatives are eligible end users of SMR services under Section 90.603(c) of the Commission's Rules.[525] SMR systems are considered shared systems pursuant to Section 90.179 of the Commission's Rules, and persons may share stations only on frequencies for which they would be eligible for a separate authorization.[526] Our rules expressly enumerate those classes of persons that may be served by SMR licensees.[527] End user eligibility was limited for some time to persons eligible for licensing under Subparts B, C, D, or E of Part 90 of the Commission's Rules.[528] Wireline telephone common carriers and foreign governments and their representatives were expressly ineligible for licensing, pursuant to Sections 90.603 and 90.115 of the Rules.[529] In 1988, the Commission amended Section 90.603(c) of the Rules to permit SMRs to serve individuals and Federal Government agencies.[530] In other words, we expressly allowed two classes of entities that were previously not permitted to share SMR facilities, to do so. The Commission did not make comparable amendments that would expressly permit foreign governments or their representatives to receive SMR service. Section 90.115 continued to render such entities ineligible under Parts B, C, D, and E of Part 90, and thus they remained ineligible to receive service from SMR licensees. Subsequently, we eliminated individual licensing of SMR end users, and SMR systems therefore achieved some of the freedom in end user selection that is enjoyed by other commercial mobile service providers, such as cellular carriers.[531] Cellular services are not restricted in their ability to serve foreign governments or their representatives, however, whereas we have not amended our Part 90 rules to expand SMR end user eligibility to include foreign governments or their representatives. To facilitate symmetrical regulation of CMRS, therefore, we intend to examine in our Further Notice of Proposed Rule Making on the transition to new regulatory treatment of reclassified mobile services whether such a restriction is still appropriate for SMR services.

IV. SUMMARY OF ACTIONS; TRANSITION RULES

A. Summary of Actions

1. *Classification of Mobile Licensees; Other Actions*

262. In summarizing the actions we have taken in this Order, we believe that the following points highlight the decisions we have made to implement the objectives of Congress in amending Section 332 of the Act. First, we have given comprehensive scope to the term ''mobile service,'' including within the definition all public mobile services, private land mobile services, and mobile satellite services, and most marine and aviation wireless services.

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[525] *See* RMD Comments at 7 n.8.

[526] 47 C.F.R. § 90.179(a).

[527] *See* 47 C.F.R. § 90.603(c).

[528] *See, e.g.,* Amendment of Part 90 of the Commission's Rules To Release Spectrum in the 806-821/851-866 MHz Bands and To Adopt Rules and Regulations Which Govern Their Use, PR Docket No. 79-191, Second Report and Order, 90 FCC 2d 1281, 1361 (1982) (setting forth previous version of Section 90.603).

[529] 47 C.F.R. §§ 90.603, 90.115.

[530] *See* Amendment of Part 90, Subparts M and S, of the Commission's Rules, PR Docket No. 86-404, Report and Order, 3 FCC Rcd 1838 (1988).

[531] *See* Amendment of Part 90 of the Commission's Rules To Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, Report and Order, 7 FCC Rcd 5558 (1992).

263. Second, we have defined the term ''commercial mobile radio service'' in a manner that covers a significant portion of services provided by mobile carriers, because of our conclusion that such a definition best serves the congressional purpose of making mobile services widely available at reasonable rates and on reasonable terms in a competitive marketplace, and is consistent with the broad language of the statute. Our reading of congressional intent finds support in the record.[532] There are three prongs to the CMRS definition: the service must be provided for profit, it must be interconnected to the public switched network, and it must be available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public. Under the first element of the definition, we have provided that ''for profit'' includes any mobile service that is provided with the intent of receiving compensation or monetary gain. In the case of services that are not-for-profit, except for a portion of excess capacity that the licensee offers with the intent of receiving compensation, the service will be treated as for-profit to the extent of such excess capacity activities.

264. Under the second element of the CMRS definition, we have concluded that a mobile service offers interconnected service if it allows subscribers to send or receive messages to or from anywhere on the public switched network. Both direct and indirect interconnection with the PSN satisfy this criterion, as well as the use of store-and-forward technology. In addressing this element of the CMRS definition, we also have given an expansive meaning to the term ''public switched network,'' concluding that the network includes the facilities of common carriers that participate in the North American Numbering Plan and have switching capability.

265. Under the third prong of the definition, we have decided that service made available ''to the public'' means any service that is offered without restriction on who may receive it. We also have concluded that whether a service is offered to ''such classes of eligible users as to be effectively available to a substantial portion of the public'' depends on several relevant factors such as the type, nature, and scope of users for whom the service is intended. We have decided not to consider limited system capacity or coverage of small geographic areas as factors in restricting public availability. If a service is provided only for internal use or only to a specified class of eligible users under the Commission's Rules, then the service will not meet the ''public availability'' prong of the CMRS definition.

266. Third, we have interpreted the term ''private mobile radio service'' by closely adhering to the statutory definition, and with the aim of advancing the congressional objective of applying a symmetrical regulatory framework to mobile services. We have determined that

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[532] Ameritech, for example, argues that:

> This proceeding was initiated at the direction of Congress to establish a level wireless playing field. At present, common carrier and private radio services that are indistinguishable to the consumer are subject to very different regulation. This caused the House Committee on Energy and Commerce to conclude that ''the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services.'' . . . By establishing like regulation of substitutable services, the Commission will promote competition. This, in turn, will enable licensees to better serve the communications needs of all wireless consumers and further allow them to maximize the efficient use of their assigned spectrum. A crucial step toward achieving Congress' goal of regulatory parity is the establishment of equal regulation for cellular and PCS licensees.

Ameritech Comments at 1-2 (citation and footnote omitted).

the statutory language and the legislative history support our conclusion that a mobile service may be classified as PMRS only if it does not fall within the statutory definition of CMRS and is not the functional equivalent of a service that meets the three-part definition of CMRS. Those services that are classified as PMRS will, however, be presumed PMRS unless it is demonstrated that the service is the functional equivalent of CMRS. In applying the functional equivalence test, we have decided to consider a variety of factors, including whether the mobile service at issue is a close substitute for any CMRS offering as evidenced by the cross-price elasticity of demand.

267. Fourth, we have applied the various definitions discussed in the preceding paragraphs to decide how to classify existing private land mobile services and common carrier mobile services. We have decided to classify all existing Government and Public Safety services, including the Special Emergency Radio Service, and all existing Industrial and Land Transportation Services, other than certain licensees in Business Radio Service, as private mobile radio services. We also have classified Automatic Vehicle Monitoring as a private mobile radio service.

268. In the Business Radio Service, which has a broader range of eligible users than other Industrial and Land Transportation services, we have classified Business Radio licensees who provide for-profit interconnected service to third-party users as CMRS. Business Radio licensees who operate not-for-profit internal systems, or who do not offer interconnected service, are classified as private.

269. We also have decided to classify SMR licensees as CMRS if they offer interconnected service to customers. This classification will apply to providers of wide-area SMR service, and to "traditional" SMR systems as well. SMR licensees who do not offer interconnected service, however, are classified as PMRS. In addition, we have concluded that private carrier paging (PCP) services should be classified as CMRS, based on our finding that PCP licensees fit the statutory definition of CMRS. We have classified as PMRS those private paging systems that service the licensee's internal communications needs but do not offer for-profit service to third-party customers. We have classified 220-222 MHz private land mobile systems using the same approach we used for classifying SMR and PCP licensees.

270. With respect to existing common carrier services, we have concluded that cellular services, 800 MHz air-ground services, common carrier paging services, mobile telephone service, improved mobile telephone service, trunked mobile telephone service, 454 MHz air-ground service, and Offshore Radio Service all should be classified as CMRS because they meet the statutory definition. With regard to mobile satellite service, we have concluded that we will exercise our discretion under the statute to determine whether the provision of space segment capacity by satellite licensees and other entities may be treated as common carriage. The provision of both space and earth segment capacity, either by satellite system licensees providing service through, for example, their own licensed earth station, or by earth station licensee resellers directly to users of commercial mobile radio services, will be treated as common carriage. In addition, we have concluded that we should seek further comment on whether we should remove current restrictions that bar CMRS providers from offering dispatch service.

271. Fifth, we have determined that personal communications services (PCS) should be classified presumptively as CMRS. Under this approach a PCS applicant or licensee would be regulated as a CMRS carrier, but would be able to offer private PCS, and be regulated as PMRS, upon making the requisite showing during the application process or subsequently. We conclude that treating PCS as presumptively CMRS most suits the manner in which we have defined PCS, and the four goals that we have established for the service — speed of deployment, universality, competitive delivery, and diversity of services.

272. Sixth, we have decided to exercise our forbearance authority regarding several Title II provisions in order to maximize market competition. We have found that our forbearance

actions will promote competition. We have also found that application of the three-pronged test set forth in Section 332(c) of the Act warrants forbearance from many Title II provisions. In general, we have forborne from enforcing any tariffing requirements, and Commission authority to investigate into existing and newly filed rates and practices, collection of intercarrier contracts, certification concerning interlocking directorates, and Commission approval relating to market entry and exit (respectively, Sections 203, 204, 205, 211, 212, and 214 of the Act). We have not forborne from provisions that are unrelated to Commission authority and regulatory obligations (Section 210), are primarily reservations of Commission authority (Sections 213, 215, 218, 219, and 221), or are consumer protection-related (Sections 223, 225, 226, 227, and 228). In addition, in the case of cellular service, we will shortly issue a Notice of Proposed Rule Making to establish monitoring provisions applicable to the cellular marketplace because of our conclusion that the cellular marketplace is not yet fully competitive. Further, as noted below,[533] we intend to issue a Notice of Proposed Rule Making addressing whether we should adopt further forbearance actions under Title II of the Act in the case of specified classes of CMRS providers.

273. Seventh, we have required LECs to provide reasonable and fair interconnection for all commercial mobile radio services, since we see no distinction between cellular carriers (to whom LECs currently are required to provide such interconnection) and all other CMRS providers, including PCS providers. In addition, we have concluded that if a LEC provides interconnection to CMRS providers while denying the same interconnection to private mobile radio service providers, the carrier would bear the burden of demonstrating why such a practice does not constitute a violation of Title II of the Act.

274. Finally, we have concluded that Congress, in revising Section 332, intended to preempt state and local rate and entry regulation of all CMRS, and we have established a range of procedural and other requirements states must meet if they seek to retain any existing CMRS rate regulation or initiate such rate regulation for the first time.

2. ***Impact on Existing Service Providers***

275. The following carriers are not subject to any new regulatory requirements as a result of this Order: (1) public land mobile service; (2) domestic public cellular radio telecommunications service; (3) 800 MHz air-ground radiotelephone service; (4) public coast and aviation stations; (5) public safety radio services; (6) special emergency radio service; (7) industrial radio services (except for business radio services); (8) land transportation radio services; and (9) radiolocation service. Those CMRS services which have traditionally been classified as common carrier services will be subject to fewer regulatory requirements because we are forbearing from applying Sections 203, 204, 205, 211, 212, and 214 of the Act.

276. AVM, most Business Radio Service (BRS) licensees, and some 220-222 MHZ land mobile system licensees will remain PMRS. Private Carrier Paging (PCPs) licensees, BRS licensees, 220-222 MHz land mobile system licensees, and SMRs that are reclassified as CMRS licensees are placed under Title II obligations. Under Sections 201, 202, and 208 of the Act, these licensees must provide interconnection upon reasonable request, must not engage in any unreasonable discriminatory practices, and will be subject to Section 208 complaints regarding any unlawful practices. These licensees will also be subject to new obligations set forth in the following Title II provisions: Sections 206, 207, and 209, which authorize the Commission to provide remedial relief to an aggrieved party pursuant to grant of a Section 208 complaint or finding of a violation of the Communications Act; and consumer protection-related provisions of Sections 223, 225, 226, 227, and 228 of the Act. The other Title II provisions from which we have not forborne do not create any new obligations for these licensees, or have only indirect impact upon them, because they are either unrelated to Commission authority and regulatory

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[533] *See* para. 285, *infra*.

obligations, or are primarily reservations of Commission authority. We believe we are not imposing any unwarranted burdens on private carriers who, by our actions herein, are now classified as CMRS providers. We are, however, initiating a Further Notice of Proposed Rule Making in this proceeding to assess whether Title II regulation should be further streamlined for certain classes of CMRS providers.

277. As existing common carrier service providers, cellular licensees are not subject to any new Title II obligations. As we have indicated, however, we intend to initiate a rule making in which we will propose to collect information regarding the cellular marketplace.

B. Transition Rules

1. *Background and Pleadings*

278. The statute provides effective dates for the "regulatory treatment" amendments to the Communications Act and sets forth deadlines for an orderly transition to the changed regulatory structure.[534] First, the statute provide that before August 10, 1994, the Commission "shall issue such modifications or terminations of the regulations applicable (before the date of enactment of this Act) to private land mobile services as are necessary to implement the amendments made by subsection (b)(2)."[535] Second, Congress has established a three-year transition period during which "any private land mobile service provided by any person before such date of enactment, and any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services, shall . . . be treated as a private mobile service."[536]

279. Several commenters raise the issue of whether the three-year transition period should apply to all private land mobile licensees who are subject to reclassification or whether some private licensees, particularly providers of wide-area SMR services, should be subject to immediate regulation as CMRS. PN Cellular and PacTel assert that the three-year transition period should only apply to private licensees whose systems were operational as of August 10, 1993.[537] PacTel argues that SMR services that are significantly different from services provided on August 10, 1994, should be immediately subject to CMRS regulation, without benefit of the three-year transition period.[538] AMTA contends, however, that the transition provision was intended to ensure that all providers of reclassified services would have three years to "adjust their business plans and marketplace strategies to an entirely new regulatory scheme."[539] Finally, in a pleading not filed in this docket, Bell Atlantic petitioned the Commission to subject all wide-area, digitally enhanced SMR services, such as those provided by Nextel, to immediate regulation as CMRS on the grounds that these are "new" services that

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[534] In most respects, Sections 332 and 3(n), as amended, became effective on August 10, 1993. Certain provisions relating to State regulation of terms and conditions regarding commercial mobile radio services, however, will take effect on August 10, 1994. *See* Budget Act, §§ 6002(c)(1), 6002(c)(2); Section 332(c)(3)(A) of the Communications Act, 47 U.S.C. § 332(c)(3)(A).

[535] Budget Act, § 6002(d)(3).

[536] *Id.*, § 6002(c)(2)(B). The provisions of Section 332(c)(6) (foreign ownership) are excepted from the three-year period. The *First Report and Order* addresses those foreign ownership provisions.

[537] PN Cellular Comments at 2-3; PacTel Reply Comments at 18-19.

[538] PacTel Reply at 18-19. PacTel also notes that this approach would not apply to paging services, because paging services are "grandfathered" based on when the frequencies were allocated.

[539] AMTA Reply Comments at 6.

were not provided at the time the Budget Act was enacted.[540] Several parties filed oppositions to Bell Atlantic's petition.[541] They argue that the Commission has previously rejected the argument that wide-area, digitally enhanced SMR service is a "new" service. The parties opposing the Bell Atlantic petition claim that the Commission authorizes digital SMR services within the existing SMR regulatory framework.[542] The parties conclude that the three-year transition period applies to wide-area, digitally enhanced SMR providers.[543]

2. *Discussion*

280. The Budget Act provides that the three-year transition period applies to "any private land mobile service provided by any person before [the] date of enactment [*i.e.*, August 10, 1993], and any paging service using frequencies allocated as of January 1, 1993." Existing private services that are subject to reclassification as CMRS under this Order will therefore continue to be regulated as private until August 10, 1996, when reclassification becomes effective. We believe that Congress established the three-year period to ensure an orderly transition for all reclassified private services. First, the statute allows one year for the Commission to establish rules, regulations, and policies that will govern the reclassified services. After we complete this transitional rule making, licensees will have notice of regulations and policies that will govern their reclassified services. Because these policies may require significant adjustments by licensees, however, *e.g.*, modification of equipment, implementation of new accounting practices, and the like, the statute provides an additional two years for private licensees to bring their services into compliance with our CMRS rules.[544]

281. With respect to private land mobile services other than paging, the statute applies the transition to "service provided by any person" before the date of enactment. We interpret this language to mean that the three-year transition applies to all private land mobile licensees who were licensed, and therefore authorized to provide service, as of August 10, 1993. On the other hand, private mobile licensees who are subject to reclassification as CMRS and were not licensed as of the enactment date, are not subject to the three-year "grandfathering" period, and will therefore be treated as CMRS as soon as our rules go into effect.

282. While we believe that Congress intended to distinguish between pre-enactment and post-enactment licensees for transition purposes, we also conclude that Congress did not intend the transition period to apply in a rigid fashion to pre-enactment licensees and that it did intend some flexibility in the implementation of these transition provisions. Therefore, we will allow grandfathered licensees to modify and expand existing systems and to acquire additional licenses in the same service for which they were licensed prior to August 10, 1993. In addition, with respect to non-grandfathered licensees, we conclude that reclassification should be effective upon the effective date of our transitional rules for reclassified services, which will be considered in

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[540] *See* Petition for Special Relief Concerning Enhanced Specialized Mobile Radio Applications and Authorizations, filed Dec. 22, 1993, by Bell Atlantic Mobile Systems, Inc. (Bell Atlantic Petition). Although the Bell Atlantic Petition and responsive pleadings were not filed in this proceeding, we are incorporating the petition into this docket because the issues that it raises are identical to those raised by other comments.

[541] AMTA Opposition, Dial Page Opposition, and Nextel Opposition. Bell Atlantic filed a reply.

[542] AMTA Opposition at 3-4; Dial Page Opposition at 3-6; Nextel Opposition at 7-10.

[543] AMTA Opposition at 4-5; Dial Page Opposition at 2; Nextel Opposition at 11-17.

[544] *See, e.g.*, 139 Cong. Rec. H6163 (daily ed. Aug. 5, 1993) (statement of Chairman Markey that transition period provides those with changed regulatory status a "reasonable time to conform with the new regulatory scheme").

our transitional rule making to be commenced shortly. The transitional rule making will enable the Commission to modify licensing procedures and harmonize technical and operational rules for services that are reclassified as CMRS. Attempting to make reclassification effective before this process is complete would cause significant disruption and confusion in the ongoing licensing and regulation of affected private mobile services.

283. We also disagree with Bell Atlantic's view that the three-year transition should not apply to wide-area SMR services on the grounds that these are ''new'' services. We agree with parties opposing Bell Atlantic that we have expressly concluded in past decisions that authorizing wide-area SMR systems did not require creation of a new service because SMR operators could provide wide-area service under their existing authorizations and our existing service rules.[545] We note that although Congress was clearly aware of the advent of wide-area SMR systems, there is no indication that Congress intended to distinguish these systems from more traditional SMR systems for transition purposes.[546] Therefore, so long as SMR licensees who provide wide-area service were licensed in the SMR service prior to August 10, 1993, such service will be regulated as private for the statutory three-year period.

284. With respect to paging services, the transition period applies more broadly. Congress specifically provided that all paging licensees ''utilizing'' private paging frequencies allocated as of January 1, 1993, are to be treated as private mobile radio service providers for three years. The Conference Report explains that paging was treated separately to prevent states from attempting to restrict entry of paging licensees on private frequencies prior to the effective date of our preemption regulations, which do not go into effect until August 10, 1994.[547] Based on this provision, we conclude that all private paging licensees are to be treated as private mobile service providers, regardless of whether they were licensed before or after the date of enactment.

C. Further Proceedings

285. The further proceedings relating to mobile services regulation that we now anticipate are as follows:

(1) We intend to issue a Notice of Inquiry in order to address the issue whether CMRS licensees should be required to provide interconnection to other carriers. We anticipate that this proceeding will define the nature and scope of such interconnection obligations. In addition, this proceeding will explore the extent to which we will require CMRS providers to allow resale of their services.

(2) We intend to initiate a proceeding on whether to impose equal access obligations on cellular, PCS, and all other CMRS providers.

(3) As soon as possible, we intend to issue a Notice of Proposed Rule Making in order to establish technical rules, as required by the Budget Act, § 6002(d)(3), with respect to the transition of existing PMRS licensees that we have reclassified as CMRS licensees. This Notice will also delineate the licensing requirements for

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[545] *See* Fleet Call, Inc., 6 FCC Rcd 1533 (1991). We have at times provided SMR operators with additional time to change their equipment and put in place more advanced technologies, but such operations take place within the terms of their existing SMR licenses.

[546] To the contrary, Chairman Markey has indicated that the transition was not intended to distinguish traditional SMR systems from so-called '' enhanced SMR'' systems. Letter from Chairman E. Markey to Chairman R. Hundt, FCC, Jan. 28, 1994.

[547] Conference Report at 498; *see* Budget Act, § 6002(c)(2)(A).

mobile services. One purpose of this proceeding will be to examine the extent to which existing rules can be modified and consolidated to account for the regulatory restructuring we have implemented in this Order pursuant to the Budget Act, as required by the Budget Act, § 6002(d)(3).

(4) We intend to issue a Notice of Proposed Rule Making addressing whether LECs should be required to file tariffs for their interconnection rates applicable to CMRS providers.

(5) We intend to issue a Notice of Proposed Rule Making to establish monitoring provisions applicable to cellular licensees.

(6) We intend shortly after the release of this item to issue a Notice of Proposed Rule Making addressing whether we should adopt further forbearance actions under Title II of the Act in the case of specified classes of CMRS providers.

(7) We intend to issue a Notice of Proposed Rule Making addressing whether we should remove the prohibition of common carriers providing dispatch service.

V. PROCEDURAL MATTERS; ORDERING CLAUSES

286. The analysis pursuant to the Regulatory Flexibility Act of 1980[548] is contained in Appendix C.

287. Accordingly, IT IS ORDERED that the rule changes as specified in Appendix A ARE ADOPTED.

288. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 90 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 4(j), 7(a), 302, 303(c), 303(f), 303(g), 303(r), 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 157(a), 302, 303(c), 303(f), 303(g), 303(r), 332(c), 332(d).

289. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), and 332(c)(1)(A) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 332(c)(1)(A), that all commercial mobile radio service providers with tariffs on file with the Commission SHALL CANCEL such tariffs. Cancellation shall be by supplement effective upon five days' notice and the supplement shall reference this Order as authority for cancellation. For this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED. These cancellations SHALL BE FILED no later than 90 days from publication of this Order in the Federal Register.

290. IT IS FURTHER ORDERED, that the Petition for Special Relief Concerning Enhanced Specialized Mobile Radio Applications and Authorizations filed by Bell Atlantic Mobile Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[548] 5 U.S.C. § 608.

APPENDIX A
Final Rules

1. The authority citation for Part 20 is as follows:

Authority: Sections 4, 303, 332, 48 Stat. 1066, 1082, as amended; 47 C.F.R. §§ 154, 303, 332.

2. Part 20 is added to read as follows:

PART 20 COMMERCIAL MOBILE RADIO SERVICES

Section

20.1 Purpose.
20.3 Definitions.
20.5 Citizenship.
20.7 Mobile services.
20.9 Commercial mobile radio service.
20.11 Interconnection to facilities of local exchange carriers.
20.13 State petitions for authority to regulate rates.
20.15 Requirements under Title II of the Communications Act.

Section 20.1 Purpose.

The purpose of these rules is to set forth the requirements and conditions applicable to commercial mobile radio service providers.

Section 20.3 Definitions.

Commercial mobile radio service. A mobile service that is: (1)(A) provided for profit, *i.e.*, with the intent of receiving compensation or monetary gain; (B) an interconnected service; and (C) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (2) the functional equivalent of such a mobile service described in paragraph (1).

Interconnection or Interconnected. Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network.

Interconnected service. A service (1) that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or (2) for which a request for such interconnection is pending pursuant to Section 332(c)(1)(B) of the Communications Act, 47 U.S.C. § 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a

licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.

Mobile Service. A radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (1) both one-way and two-way radio communication services; (2) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation; and (3) any service for which a license is required in a personal communications service under Part 24 of this chapter.

Private Mobile Radio Service. A mobile service that is neither a commercial mobile radio service nor the functional equivalent of a service that meets the definition of commercial mobile radio service. Private mobile radio service includes the following:

(a) Not-for-profit land mobile radio and paging services that serve the licensee's internal communications needs as defined in Part 90 of this chapter. Shared-use, cost-sharing, or cooperative arrangements, multiple licensed systems that use third party managers or users combining resources to meet compatible needs for specialized internal communications facilities in compliance with the safeguards of Section 90.179 are presumptively private mobile radio services.

(b) Mobile radio service offered to restricted classes of eligible users. This includes the following services: Public Safety Radio Services; Special Emergency Radio Service; Industrial Radio Services (excluding Business Radio Services that offer customers for-profit interconnected services); Land Transportation Radio Services; and Radiolocation Services.

(c) 220-222 MHz land mobile service and Automatic Vehicle Monitoring systems (Part 90) that do not offer interconnected service or that are not-for-profit.

(d) Personal Radio Services under Part 95 of the rules (General Mobile Services, Radio Control Radio Services, and Citizens Band Radio Services); Maritime Service Stations (excluding Public Coast stations) (Part 80); and Aviation Service Stations (Part 87).

Public Switched Network. Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.

Section 20.5 Citizenship.

(a) This rule implements Section 310 of the Communications Act, 47 U.S.C. § 310, regarding the citizenship of licensees in the commercial mobile radio services. Commercial mobile radio service authorizations may not be granted to or held by:

(1) Any foreign government or any representative thereof;

(2) Any alien or the representative of any alien;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country; or

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(b) The limits listed in subsection (a) may be exceeded by eligible individuals who held ownership interests on May 24, 1993, pursuant to the waiver provisions established in Section 332(c)(6) of the Communications Act. Transfers of ownership to any other person in violation of paragraph (a) are prohibited.

Section 20.7 Mobile services.

The following are mobile services within the meaning of Sections 3(n) and 332 of the Communications Act, 47 U.S.C. §§ 153(n), 332.

(a) Public mobile services (Part 22), including fixed operations that support the mobile systems, but excluding Rural Radio Service and Basic Exchange Telecommunications Radio Service (Subpart H);

(b) Private land mobile services (Part 90), including secondary fixed operations, but excluding fixed services such as call box operations and meter reading;

(c) Mobile satellite services (Part 25) including dual-use equipment, terminals capable of transmitting while a platform is moving, but excluding satellite facilities provided through a transportable platform that cannot move when the communications service is offered;

(d) Marine and aviation services (Part 80 and Part 87), including fixed operations that support these marine and aviation mobile systems;

(e) Personal radio services (Part 95), but excluding Interactive Video and Data Service;

(f) Personal communications services (Part 24);

(g) Auxiliary services provided by mobile service licensees, and ancillary fixed communications offered by personal communications service providers;

(h) Unlicensed services meeting the definition of commercial mobile radio service in Section 20.3 of this part, such as the resale of commercial mobile radio services, but excluding unlicensed radio frequency devices under Part 15 of this chapter (including unlicensed personal communications service devices).

Section 20. 9 Commercial mobile radio service.

(a) The following mobile services shall be treated as common carriage services and regulated as commercial mobile radio services (including any such service offered as a hybrid service or offered on an excess capacity basis to the extent it meets the definition of commercial mobile radio service, or offered as an auxiliary or ancillary service), pursuant to Section 332 of the Communications Act, 47 U.S.C. § 332:

(1) Private Paging (Part 90), excluding not-for-profit paging systems that serve only the licensee's own internal communications needs.

(2) Business Radio Services (Section 90.75) that offer customers for-profit interconnected service.

(3) Land Mobile Systems on 220-222 MHz (Part 90), except services that are not-for-profit or do not offer interconnected service.

(4) Specialized Mobile Radio services that provide interconnected service (Part 90).

(5) Public Coast Stations (Part 80, Subpart J).

(6) Public Land Mobile Service (paging, mobile telephone, improved mobile telephone, trunked mobile, and 454 MHz air-ground services) (Part 22, Subpart G).

(7) Domestic Public Cellular Radio Telecommunications Service (Part 22, Subpart K).

(8) 800 MHz Air-Ground Radiotelephone Service (Part 22, Subpart M).

(9) Offshore Radio Service (Part 22, Subpart L).

(10) Any mobile satellite service involving the provision of commercial mobile radio service (by licensees or resellers) directly to end users, except that mobile satellite licensees and other entities that sell or lease space segment capacity, to the extent that it does not provide commercial mobile radio service directly to end users, may provide space segment capacity to commercial mobile radio service providers on a non-common carrier basis, if so authorized by the Commission.

(11) Personal Communications Services (Part 24), except as provided in paragraph (b) of this section.

(12) For-profit subsidiary communications services transmitted on subcarriers within the FM baseband signal, that provide interconnected service (47 C.F.R. § 73.295).

(13) A mobile service that is the functional equivalent of a commercial mobile radio service.

(i) A mobile service that does not meet the definition of commercial mobile radio service is presumed to be a private mobile radio service.

(ii) Any interested party may seek to overcome the presumption that a particular mobile radio service is a private mobile radio service by filing a petition for declaratory ruling challenging a mobile service provider's regulatory treatment as a private mobile radio service.

(A) The petition must show that:

(1) the mobile service in question meets the definition of commercial mobile radio service; or

(2) the mobile service in question is the functional equivalent of a service that meets the definition of a commercial mobile radio service.

(B) A variety of factors will be evaluated to make a determination whether the mobile service in question is the functional equivalent of a commercial mobile radio service, including: consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review.

(C) The petition must contain specific allegations of fact supported by affidavit(s) of person(s) with personal knowledge. The petition must be served on the mobile service provider against whom it is filed and contain a certificate of service to this effect. The mobile service provider may file an opposition to the petition and the petitioner may file a reply. The general rules of practice and procedure contained in Section 1.1 through Section 1.52 of this chapter shall apply.

(b) Licensees of a Personal Communications Service or applicants for a Personal Communications Service license proposing to use any Personal Communications Service spectrum to offer service on a private mobile radio service basis must overcome the presumption that Personal Communications Service is a commercial mobile radio service.

(1) The applicant or licensee (who must file an application to modify its authorization) seeking authority to dedicate a portion of the spectrum for private mobile radio service, must include a certification that it will offer Personal Communications Service on a private mobile radio service basis. The certification must include a description of the proposed service sufficient to demonstrate that it is not within the definition of commercial mobile radio service in Section 20.3. Any application requesting to use any Personal Communications Service spectrum to offer service on a private mobile radio service basis will be placed on public notice by the Commission.

(2) Any interested party may file a petition to deny the application within 30 days after the date of public notice announcing the acceptance for filing of the application. The petition shall contain specific allegations of fact supported by affidavit(s) of person(s) with personal knowledge to show that the applicant's request does not rebut the commercial mobile radio service presumption. The petition must be served on the applicant and contain a certificate of service to this effect. The applicant may file an opposition with allegations of fact supported by affidavit. The petitioner may file a reply. No additional pleadings will be allowed. The general rules of practice and procedure contained in Section 1.1 through Section 1.52 and Section 22.30 of this chapter shall apply.

(c) Any provider of private land mobile service before August 10, 1993 (including any system expansions, modifications, or acquisitions of additional licenses in the same service, even if authorized after this date), and any private paging service utilizing frequencies allocated as of January 1, 1993, that meet the definition of commercial mobile radio service, shall, except for purposes of Section 20.5 (applicable August 10, 1993 for the providers listed in this paragraph), be treated as private mobile radio service until August 10, 1996. After this date, these entities will be treated as commercial mobile radio service providers regulated under this part.

Section 20.11 Interconnection to facilities of local exchange carriers.

(a) A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable. Complaints against carriers under Section 208 of the Communications Act, 47 U.S.C. Section 208, alleging a violation of this section shall follow the requirements of Sections 1.711-1.734 of this chapter, 47 C.F.R. §§ 1.711-1.734.

(b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.

(1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.

(2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

Section 20.13 State petitions for authority to regulate rates.

(a) States may petition for authority to regulate the intrastate rates of any commercial mobile radio service. The petition must include the following:

(1) Demonstrative evidence that market conditions in the state for commercial mobile radio services do not adequately protect subscribers to such services from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Alternatively, a state's petition may include demonstrative evidence showing that market conditions for commercial mobile radio services do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and that a substantial portion of the commercial mobile radio service subscribers in the state or a specified geographic area have no alternatives means of obtaining basic telephone service This showing may include evidence of the range of basic telephone service alternatives available to consumers in the state.

(2) The following is a non-exhaustive list of examples of the types of evidence, information, and analysis that may be considered pertinent to determine market conditions and consumer protection by the Commission in reviewing any petition filed by a state under this section:

(i) The number of commercial mobile radio service providers in the state, the types of services offered by commercial mobile radio service providers in the state, and the period of time that these providers have offered service in the state.

(ii) The number of customers of each commercial mobile radio service provider in the state; trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile radio service provider.

(iii) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable.

(iv) An assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state.

(v) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry.

(vi) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the state.

(vii) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative.

(viii) Information regarding customer satisfaction or dissatisfaction with services offered by commercial mobile radio service providers, including statistics and other information about complaints filed with the state regulatory commission.

(3) Petitions must include a certification that the state agency filing the petition is the duly authorized state agency responsible for the regulation of telecommunication services provided in the state.

(4) Petitions must identify and describe in detail the rules the state proposes to establish if the petition is granted.

(5) States have the burden of proof. Interested parties may file comments in support or in opposition to the petition within 30 days after public notice of the filing of a petition by a state under this section. Any interested party may file a reply within 15 days after the expiration of the filing period for comments. No additional pleadings may be filed. Except for Section 1.45, practice and procedure rules contained in Sections 1.42-1.52 of this chapter shall apply. The provisions of sections 1.771-1.773 do not apply.

(6) The Commission shall act upon any petition filed by a state under this paragraph not later than the end of the nine-month period after the filing of the petition.

(7) If the Commission grants the petition, it shall authorize the state to regulate rates for commercial mobile radio services in the state during a reasonable period of time, as specified by the Commission. The period of time specified by the Commission will be that necessary to ensure that rates are just and reasonable, or not unjustly or unreasonably discriminatory.

(b) States that regulated rates for commercial mobile services as of June 1, 1993, may petition the Commission under this section before August 10, 1994, to extend this authority.

(1) The petition will be acted upon by the Commission in accordance with the provisions of paragraphs (a)(1) through (a)(5) of this section.

(2) The Commission shall act upon the petition (including any reconsideration) not later than the end of the 12-month period following the date of the filing of the petition by the state involved. Commercial mobile radio service providers offering such service in the state shall comply with the existing regulations of the state until the petition and any reconsideration of the petition are acted upon by the Commission.

(3) The provisions of paragraph (a)(7) of this section apply to any petition granted by the Commission under this paragraph.

(c) No sooner than 18 months from grant of authority by the Commission under this section for state rate regulations, any interested party may petition the Commission for an order to discontinue state authority for rate regulation.

(1) Petitions to discontinue state authority for rate regulation must be based on recent empirical data or other significant evidence demonstrating that the exercise of rate authority by a state is no longer necessary to ensure that the rates for commercial mobile are just and reasonable or not unjustly or unreasonably discriminatory.

(2) Any interested party may file comments in support of or in opposition to the petition within 30 days after public notice of the filing of the petition. Any interested party may file a reply within 15 days after the time for filing comments has expired. No additional

pleadings may be filed. Except for 1.45, practice and procedure rules contained in Sections 1.42-1.52 apply. The provisions of Sections 1.771-1.773 do not apply.

(3) The Commission shall act upon any petition filed by any interested party under this paragraph within nine months after the filing of the petition.

Section 20.17 Requirements under Title II of the Communications Act.

(a) Commercial mobile radio services providers, to the extent applicable, must comply with Sections 201, 202, 206, 207, 208, 209, 216, 217, 223, 225, 226, 227, and 228 of the Communications Act, 47 U.S.C §§ 201, 202, 206, 207, 208, 209, 216, 217, 223, 225, 226, 227, 228; part 68 of this chapter, 47 C.F.R. Part 68; and sections 1.701-1.748, and 1.815 of this chapter, 47 C.F.R. §§ 1.701-1.748, 1.815.

(b) Commercial mobile radio service providers are not required to:

(1) File tariffs for interstate service to their customers, or for interstate access service, or comply with sections 1.771-1.773 and part 61 of this chapter;

(2) File with the Commission copies of contracts entered into with other carriers or comply with other reporting requirements, or with sections 1.781-1.814 and 43.21 of this chapter;

(3) Seek authority for interlocking directors (section 212 of the Communications Act);

(4) Submit applications for new facilities or discontinuance of existing facilities (Section 214 of the Communications Act).

(c) Nothing in this section shall be construed to modify the Commission's rules and policies on the provision of international service under Part 63 of this chapter.

3. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 C.F.R. §§ 154, 303.

Part 22 Public Mobile Service

4. Section 22.1 is amended by adding paragraph (g) to read as follows:

Section 22.1 Other applicable rule parts.

* * * * * * *

(g) Part 20 which governs commercial mobile radio services which include the following services in this part:

(1) Public Land Mobile;

(2) Offshore Radio Service;

(3) Domestic Public Cellular Radio Telecommunications Service;

(4) 800 MHz Air-Ground Radiotelephone Service.

5. Section 22.13 is amended by removing paragraph (f).

6. Section 22.43 is amended by removing paragraph (b)(2).

7. Section 22.304 is removed.

8. The authority citation for Part 80 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 C.F.R. §§ 154, 303.

Part 80 Stations in the Maritime Service

9. Section 80.3 is amended by removing paragraphs (g) through (k), by redesignating paragraphs (f), and (l) through (o) as (g), and (h) through (k), respectively, and by adding new paragraph (f) to read as follows:

Section 80.3 Other applicable rule parts of this chapter.

* * * * * * *

(f) Part 20 which governs commercial mobile radio services which include Subpart J of this part (public coast stations).

* * * * * * *

10. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 C.F.R. §§ 154, 303.

Part 90 Private Land Mobile Radio Service

11. Section 90.5 is amended by redesignating paragraphs (h) through (j) as paragraphs (i) through (k), respectively, and by adding paragraph (h) to read as follows:

Section 90.5 Other applicable rule parts.

* * * * * * *

(h) Part 20 which governs commercial mobile radio service applicable to certain providers in the following services in this part:

(1) Business radio service;

(2) Private paging;

(3) Land mobile service on 220-222 MHz;

(4) Specialized Mobile Radio Service.

* * * * * * *

12. The authority citation for Part 99 continues to read as follows:

Authority: Sections 4, 301, 302, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303 and 332, unless otherwise noted.

13. In 47 C.F.R. Part 99 is redesignated as Part 24.

Part 24 Personal Communications Services

14. In redesignated Part 24, Section 24.2 is amended by redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively, and by adding a new paragraph (g) to read as follows:

Section 24.2 Other applicable rule parts.

* * * * * * *

(g) Part 20. This part governs commercial mobile radio services.

* * * * * * *

APPENDIX B

Index of Rules and Related Provisions

The following table lists the provisions of Part 20 of the Commission's Rules, as adopted in this Order, together with related provisions in the Communications Act and this Order. The table is intended as a guide for the reader, and is not intended to have any decisional or interpretative significance. Paragraphs in the third column refer to the text of the Order; sections refer to the Communications Act.

RULE	TOPIC	RELATED PROVISION
20.1	Purpose of Part 20	None applicable.
20.3	Definition — Commercial mobile radio service	¶¶ 43-49, 54-60, 65-70, 79-80; § 332(d)(1)
20.3	Definition — Interconnection or Interconnected	¶ 56-58; §§ 332(c)(1)(B), 332(d)(2)
20.3	Definition — Interconnected service	¶¶ 54-60; § 332(d)(2)
20.3	Definition — Mobile service	¶¶ 34-38; § 3(n)
20.3	Definition — Private mobile radio service	¶¶ 76-80; § 332(d)(3)
20.3	Definition — Public switched network	¶¶ 59-60; § 332(d)(2)
20.5(a)	Citizenship — General requirements	§ 310
20.5(b)	Citizenship — Exception	§ 332(c)(6)
20.7	Mobile services	¶¶ 34-38
20.7(a)	Public mobile service (Part 22)	¶¶ 34, 38
20.7(b)	Private land mobile service (Part 90)	¶ 35
20.7(c)	Mobile satellite service (Part 25)	¶¶ 35, 38
20.7(d)	Marine, aviation services (Parts 80, 87)	¶ 34
20.7(e)	Personal radio service (Part 95)	¶ 35
20.7(f)	Personal communications service (Part 24)	¶ 35
20.7(g)	Auxiliary services; PCS ancillary fixed services	¶ 36
20.7(h)	Unlicensed services	¶ 37
20.9	Commercial mobile radio service	§§ 332(c)(1)(A), 332(d)(1)
20.9(a)(1)	Private paging (Part 90)	¶¶ 96-97
20.9(a)(2)	Business Radio Services	¶¶ 86-87
20.9(a)(3)	220-222 MHz land mobile service (Part 90)	¶¶ 94-95
20.9(a)(4)	Specialized mobile radio service (Part 90)	¶¶ 88-93
20.9(a)(5)	Public coast stations (Part 80)	¶ 83
20.9(a)(6)	Public land mobile service (Part 22)	¶ 102
20.9(a)(7)	Cellular service (Part 22)	¶ 102

RULE	TOPIC	RELATED PROVISION
20.9(a)(8)	Air-ground service (Part 22)	¶ 102
20.9(a)(9)	Offshore radio service (Part 22)	¶ 102 & note 211
20.9(a)(10)	Satellite service (Part 25)	¶¶ 108-109
20.9(a)(11)	Personal communications services (Part 24)	¶ 118
20.9(a)(12)	FM subcarrier (47 C.F.R. § 73.295)	¶ 260
20.9(a)(13)	Functionally equivalent services	¶¶ 79-80
20.9(b)	Personal communications service	¶ 119
20.9(c)	Transition	¶¶ 280-284
20.11(a)	LEC interconnection requirements	¶¶ 230, 233-234; § 332(c)(1)(B)
20.11(b)	Mutual compensation	¶ 232
20.13(a)(1)	State petitions for rate regulation — General evidence	¶¶ 251, 253; § 332(c)(3)(A)
20.13(a)(2)	Types of evidence	¶ 252
20.13(a)(3)	Filing entitiy	¶ 251
20.13(a)(4)	Proposed state rules	¶ 252
20.13(a)(5)	Evidentiary burdens; filing procedures	¶ 251; § 332(c)(3)(A)
20.13(a)(6)	Commission action	§§ 332(c)(3)(A), 332(c)(3)(B)
20.13(a)(7)	Grant of state petitions	¶ 257; § 332(c)(3)(A)
20.13(b)	Extension of existing state rate authority	§ 332(c)(3)(B)
20.13(c)	Suspension of state rate regulation	¶ 254; § 332(c)(3)(B)
20.15(a)	Title II requirements — applicable sections	¶¶ 186-187, 205-213; § 332(c)(1)(A)
20.15(b)	Forborne sections	¶¶ 173-181, 192-197; § 332(c)(1)(A)
20.15(c)	International service	¶126 & note 261

APPENDIX C

Final Regulatory Flexibility Analysis

Pursuant to Section 603 of Title 5, United States Code, 5 U.S.C. § 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rulemaking in GN Docket No. 93-252. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

A. Need for and Purpose of Rules

This rule making proceeding was initiated to implement Sections 3(n) and 332 of the Communications Act. The rules adopted herein will carry out the intent of Congress to establish a uniform regulatory framework for all mobile services. This action will enhance the ability of mobile service providers to make services available to the public.

B. Issues Raised by the Public in Response to the Initial Analysis

While all the parties recognize that this rulemaking will impose new legal obligations on licensees whose regulatory status has changed from private to commercial as a result of the new legislation and the actions we have taken in this Order, a number of parties propose that licensees should be able to offer both commercial and private radio service on the same system and under a single license. As a result of these comments, we have adopted these proposals. As a result of other comments, we have made modifications to other proposals as appropriate.

C. Significant Alternatives Considered

We have reduced the burdens wherever possible. In an effort to reduce the burdens on small entities, we will not impose any tariff filing obligations. In striving to adopt an appropriate level of regulation for commercial mobile radio service (CMRS) providers, we have ensured that unwarranted regulatory burdens are not imposed upon small entities, especially those that are currently private mobile licensees and are reclassified as CMRS providers. First, in keeping with this objective, we have forborne from establishing market entry or exit requirements under Section 214 of the Act. Second, although we have decided not to forbear with respect to Sections 210, 213, 215, 218, 219, 220, and 221, we have decided not to invoke our authority under these provisions. The imposition of requirements under these provisions could cause unwarranted burdens for CMRS providers that are small entities.

Third, while we have chosen not to forbear from specific provisions of Title II that are designed to protect customers, we do not believe that small entities will incur significant burdens as a result of becoming subject to these provisions. Thus, the regulatory burdens that we have retained are necessary to ensure that commercial mobile radio service is made available to the public at reasonable rates and on reasonable terms in a competitive marketplace. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant impact on small entities. Accordingly, we intend to issue a Notice of Proposed Rule Making addressing whether we should adopt further forbearance action under Title II of the Act in the case of specific classes of providers. Finally, we emphasize that the three-year transition rules adopted in this Order will allow existing licensees that are subject to reclassification as CMRS providers to continue to be regulated as private until August 10, 1996. This three-year period will ensure an orderly transition for all reclassified private licensees that are small entities.

APPENDIX D

List of Parties Filing Comments

Party (and Short Title)

Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. (AMT/DSST)
Aeronautical Radio, Inc. (ARINC)
AllCity Paging, Inc. (AllCity)
American Mobile Telecommunications Association, Inc. (AMTA)
American Petroleum Institute (American Petroleum)
Ameritech
AMSC Subsidiary Corporation (AMSC)
Arch Communications Group, Inc. (Arch)
Association of American Railroads (AAR)
Association of Public-Safety Communications Officials-International, Inc. (APCO)
Bell Atlantic Companies (Bell Atlantic)
BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., and Mobile Communications Corporation of America (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
Celpage, Inc., Network USA, Denton Enterprises, Copeland Communications & Electronics, Inc. and Nationwide Paging (Celpage)
CenCall Communications Corporation (CenCall)
Century Cellunet Inc. (Century)
Comcast Corporation (Comcast)
Corporate Technology Partners (CTP)
Cox Enterprises, Inc. (Cox)
E.F. Johnson Company (E.F. Johnson)
General Communication, Inc. (GCI)
Geotek Industries, Inc. (Geotek)
Grand Broadcasting Corporation (Grand)
GTE Service Corporation (GTE)
Hardy & Carey (Hardy)
Illinois Valley Cellular RSA 2 Partnerships (IVC Partnerships)
In-Flight Phone Corporation (In-Flight)
Industrial Telecommunications Association, Inc. (ITA)
Liberty Cellular, Inc. (Liberty)
Lower Colorado River Authority (LCRA)
McCaw Cellular Communications, Inc. (McCaw)
MCI Telecommunications Corporation (MCI)
Metricom, Inc. (Metricom)
Mobile Telecommunication Technologies Corp. (Mtel)
Motorola, Inc. (Motorola)
MPX Systems (MPX)
National Association of Business and Educational Radio, Inc. (NABER)

National Association of Regulatory Utility Commissioners (NARUC)
National Cellular Resellers Association (NCRA)
National Telephone Cooperative Association (NTCA)
New Par
New York State Department of Public Service (New York)
Nextel Communications, Inc. (Nextel)
North Pittsburg Telephone Company (NPTC)
NYNEX Corporation (NYNEX)
Pacific Bell and Nevada Bell (Pacific)
Pacific Telecom Cellular, Inc. (PTC)
Pactel Corporation (Pactel)
Pactel Paging (Pactel Paging)
Pagemart, Inc. (Pagemart)
Paging Network, Inc. (PageNet)
People of the State of California and the Public Utilities Commission of the State of California (California)
Personal Radio Steering Group Inc. (PRSG)
Pioneer Telephone Cooperative, Inc., Pioneer Telecommunications, Inc., and O.T.&T. Communications, Inc. (Pioneer)
PN Cellular, Inc. and Affiliates (PNC)
PTC Cellular (PTC-C)
Public Service Commission of the District of Columbia (DC PSC)
Ram Mobile Data USA Limited Partnership (RMD)
Reed Smith Shaw & McClay (Reed Smith)
Rig Telephones, Inc. (Rig)
Roamer One, Inc. (Roamer)
Rochester Telephone Corporation (Rochester)
Rockwell International Corporation (Rockwell)
Rural Cellular Association (Rural Cellular)
Southwestern Bell Corporation (Southwestern)
Sprint Corporation (Sprint)
Starsys Global Positioning, Inc. (Starsys)
Telephone and Data Systems, Inc. (TDS)
Telocator, The Personal Communications Industry Association (Telocator)
Time Warner Telecommunications (Time Warner)
TRW Inc. (TRW)
United States Telephone Association (USTA)
US West
Utilities Telecommunications Council (UTC)
Vanguard Cellular Systems, Inc. (Vanguard)
Waterway Communications System, Inc. (Waterway)

List of Parties Filing Reply Comments

Aeronautical Radio, Inc. (ARINC)
American Mobile Telecommunications Association, Inc. (AMTA)
American Paging, Inc. (AmP)
American Petroleum Institute (American Petroleum)
American Telephone and Telegraph Company (AT&T)
AMSC Subsidiary Corporation (AMSC)
ARCH Communication Group (Arch)
Association of American Railroads (AAR)
Bell Atlantic Companies (Bell Atlantic)
BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp. and Mobile Communications Corp. of America (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
CenCall Communications Corporation (CenCall)
Century Cellunet Inc. (Century)
E.F. Johnson Company (E.F. Johnson)
General Communication, Inc. (GCI)
GTE Service Corporation (GTE)
In-Flight Phone Corporation (In-Flight)
Industrial Telecommunications Association, Inc. (ITA)
McCaw Cellular Communications, Inc. (McCaw)
MCI Telecommunications Corporation (MCI)
Metricom, Inc. (Metricom)
Mobile Marine Radio, Inc. (MMR)
National Association of Business and Educational Radio, Inc. (NABER)
Nextel Communications, Inc. (Nextel)
NYNEX Corporation (NYNEX)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell (Pacific)
PacTel Paging (Pactel Paging)
Pactel Corporation (PacTel)
Pagemart, Inc. (Pagemart)
Paging Network, Inc. (PageNet)
Pennsylvania Public Utility Commission (PA PUC)
PSC of Nevada (Nevada)
Puerto Rico Telephone Company (PRTC)
Radiofone Inc. (Radiofone)
Ram Mobile Data USA Limited Partnership (RMD)
Roamer One, Inc. (Roamer)
Rochester Telephone Corporation (Rochester)
Rural Cellular Association (Rural Cellular)
RVC Services, Inc., d/b/a Coastel Communications Co. (Coastel)
SACO River Cellular Telephone company (Saco River)
Securicor PMR Systems Ltd. (Securicor)
Southwestern Bell Corporation (Southwestern)

Sprint Corporation (Sprint)
Telephone and Data System Inc. (TDS)
Telocator, The Personal Communications Industry Association (Telocator)
TRW Inc. (TRW)
Two Way Radio of Carolina, Inc. (2-Way)
United States Telephone Association (USTA)
US West
Utilities Telecommunications Council (UTC)
Waterway Communications Systems, Inc. (Waterway)

Separate Statement

of

Commissioner Andrew C. Barrett

Re: Communications Act Section 332 Regulatory Treatment of Mobile Services

This comprehensive Report and Order revises our rules to implement Sections 3(n) and 332 of the Communications Act, as amended in the Omnibus Budget Reconciliation Act of 1993[Act]. I believe this Act is intended to regulate commercial mobile service providers [CMRS] in a "like" manner, where such services can be considered in compliance with the three-prong definition of a commercial mobile service, or the services are a functional equivalent of the service categories clearly defined as CMRS. In this regard, I believe the Act provides the Commission with sufficient flexibility to simplify its regulatory structure for all services classified as CMRS. Further, with respect to forbearance from Title II regulation under the CMRS designation, I believe the Act provides plenty of flexibility for the Commission to avoid any perverse, or unintended consequences of imposing Title II regulation on various classes of CMRS providers. In addition, the Act clearly contemplates a three-year transition period for those services who are presently classified as Private Mobile Service licensees [PMRS] to adapt to any reclassification as a CMRS licensee under Title II regulation.

After examining the comprehensive nature of this attempt to implement the Act and adopt a CMRS classification, I support the overall framework of this Order as a general matter, but remain seriously concerned about a variety of issues which must still be resolved or refined from my perspective---- either with respect to potential unintended consequences due to a broad application of the CMRS definition, or with respect to the need for greater flexibility in deciding which classes of CMRS services should be subject to less Title II regulation than others. Fortunately, the Order accommodates a further notice addressing the potential need for a more streamlined subclass of CMRS regulation under Title II. This is an important issue due to my desire to avoid regulatory classifications which could create undue economic hardship or regulatory burdens on certain classes of services which are not offered across wide areas, in cellular-like configurations, or traditionally are not provided indiscriminately to broad classes of users. Hopefully, the further notice will allow the Commission to develop a more complete record in this regard, and allow us to justify further forbearance from Title II for certain subclasses of CMRS providers.

In addition to the further notice on potential CMRS subclasses of streamlined regulation, I also am encouraged by our effort to develop a record on interconnection and equal access issues in the CMRS context. I believe these are important issues to address as we develop a network-of-network concept within the CMRS classification. I look forward to addressing these issues in a subsequent Order.

This Order also accommodates my concerns regarding flexible PCS methodologies which allow future PCS licensees to apply under the CMRS definition, or make a showing that they will not provide CMRS services, and thus should be regulated as private carriers. I believe this approach in the Order will allow flexibility for future PCS services to provide PMRS or CMRS services.

With respect to other provisions which will be enforced under this Order, I have two additional implementation concerns. First, the Order defines the public switched network with respect to CMRS classifications as any entity that utilizes the North American Numbering Plan [NANP]. My concern is that this definition should not result in the unintended result of subjecting any CMRS networks to ONA unbundling requirements, network outage reporting requirements, universal service obligations, or other requirements typically associated with the regulation of Bell Operating Companies. The Order clarifies that this will not be the result of this expansive definition of public switched network under the CMRS classification.

Second, the Order establishes a regulatory precedent for hybrid CMRS/PMRS regulation of any network that offers both CMRS service and PMRS service. From an enforcement perspective, I am unclear as to the implications of this type of regulatory structure in the market. If there is potential confusion created by this classification, I hope interested parties will provide further guidance as to the regulatory consequences or economic implications of regulating one part of a network with an array of Title II provisions, including TDD and TOCSIA, and regulating the other side of the same network as a PMRS provider.

Overall, this Order addresses complex, interrelated issues in a comprehensive manner. The remaining issues which can be refined should strengthen this Order in the future, and provide more clarity in the marketplace. Thus, I support the item.

*U.S. Government Printing Office: 1994 — 300-842/00014